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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

MAY, 1865.

JUDGES OF THE COURT.

HON. WILLIAM B. HYMAN, *Chief Justice.*

HON. ZENON LABAUVE,	} <i>Associate Justices.</i>
HON. JOHN H. LISLEY,	
HON. R. K. HOWELL,	
HON. R. B. JONES.	

MARGARET HAUGHERY v. JOHN M. LEE.

The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or other disposition of such property may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. No other kind of questions are permitted.

Answers to interrogatories are not required to be made in any peculiar set phrases, so that they are responsive.

A PPEAL from the Fifth District Court of New Orleans, *Howell*, (acting) J.

Durant & Hornor, for Plaintiff. *Whitaker, Fellows & Mills*, for defendant and appellant.

HYMAN, C J. This is a petitory action, instituted by plaintiff, to recover of defendant certain immovable property in the city of New Orleans.

Defendant, in his answer, admitted possession of the property, and that the title thereof was in the name of the plaintiff; but alleged that it was bought and paid for by him.

He asked for judgment, decreeing him to be the owner, and that plaintiff be ordered to answer, under oath, certain interrogatories, on facts and articles, annexed to his answers.

The lower court rendered judgment, decreeing and ordering defendant to deliver the property to plaintiff, and to pay costs of suit.

From this judgment defendant has appealed.

Defendant contends that the following interrogatories, propounded by him to plaintiff, and answered by plaintiff, under oath, by order of the

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court, should be taken as confessed by plaintiff—the answers not being responsive to the questions :

1st. "Was not the property described in the act of the 14th May, 1860, before M. Gernon; bought by defendant, John M. Lee, for his sole use and benefit?"

Answer.—"It was bought for my benefit."

2d. "Did you not permit the use of your name, in said act, for that purpose?"

Reply.—"It was for my benefit."

These answers are not evasive, but responsive to the questions.

If the plaintiff's name was used for her benefit, in the purchase of the property, and it was bought for her benefit, it is impossible that the property could have been bought for the sole use and benefit of defendant or that her name used in the purchase, could have been for his benefit.

The law does not require the answers to interrogatories to be made in any peculiar set phrases.

After plaintiff had answered the interrogatories annexed to defendant's answer, defendant propounded other interrogatories to plaintiff.

Plaintiff objected to answering these interrogatories, because they were in conflict with the article, 2255 of the Civil Code; and because the plaintiff having been interrogated, as to the verbal agreement, for the transfer of the real estate in question, had denied the existence of any such agreement, which denial was conclusive.

The court sustained plaintiff's objection, and refused to order the interrogatories to be answered. To this ruling of the court defendant objected, and filed a bill of exceptions.

The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or other disposition of immovable property, may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. See Civil Code, Art. 2255.

No other kind of questions is permitted by this article.

The reply to the questions: Whether she (plaintiff) had paid anything for the property in dispute? Whose money paid for it? Whether she had not told others that the property belonged to defendant, and that she would make him a title to the property when he desired it? (which were the questions asked) would not be a confession of title, but an acknowledgment of what she had not done, what others had done, and what she had said.

The replies to the questions might possibly establish title in defendant, not by confession of title, when interrogated on oath, as required by the article cited, but by acknowledgment of a verbal statement, formerly made by her.

Judgment affirmed, with costs.

Judge HOWELL, having tried this cause in the lower court, took no part in this decision.

JOHN CREEN, Master, ET. AL., v. E. FRANCISCO CROCE, ET. AL., E. A. CROCE, Master of Orozimbo, v. TOWBOAT VANDERBILT, ET AL.
(CONSOLIDATED CASES.)

Where a witness is merely a nominal party to the suit, and disclaims any personal interest therein, he is competent.

A towboat's private book of rules and regulations cannot be received in evidence even when accompanied by oral testimony.

Any accident, except such as impossible to be foreseen or avoided, that may happen to any steamboat from running into or foul of another boat; or, whenever an accident happens from the boat being overloaded, the owner of the boat causing such accident shall be responsible for all loss and damage as a common carrier, and also subject to fine and imprisonment.

APPPEAL from the Fourth District Court of New Orleans, Allen, J.

E. Rawle, for plaintiffs. *Gilmore*, for Hyde & Mackie, appellants.
William D. Hennen, for Ship, *et als*.

Rawle for plaintiff.—The captain of the Vanderbilt was wrong in attempting to execute a manœuvre which was improper and dangerous. *The Thames*, 5 Rob. Ad. 345. *The Shannon*, 2 Haggard, 173.

It is for the owners of the steamer to prove that the collision could have been avoided. *Betoso v. U. S. Mail Co.*, 9 An. 268. *Martino v. Boggs*, 1 An. 75. *Sparks v. Salladin*, 6 Ann. 764.

This is an aggravated case, and there should have been no appeal. Damages may be justly given, as prayed for.

Gilmore for Hyde & Mackie.—The master of the Digby sues the owners of the Orozimbo, and Hyde & Mackie, whom he alleges to be the owners of the Vanderbilt, for damages suffered by the collision.

The owners of the Orozimbo also sue the Vanderbilt for damage alleged to have been suffered by that ship. Both suits have been tried together.

As against the Vanderbilt, it is, of course, alleged that the collision was occasioned by negligence and want of proper skill on the part of the officers and crew of that vessel.

This is the gist of the action, and it is incumbent on the plaintiffs to establish it.

If the collision was not occasioned by the fault or negligence of the officers and crew of the Vanderbilt, or if it was the result of accident, which ordinary diligence could not prevent, or of mutual fault, or if by proper care and management on the part of one or both of the colliding ships it could have been avoided, then the appellants are not liable.

Lord Tenderden, in two cases, at *Nisi Prius*, has laid down the doctrine of the common law applicable to cases of damage by a collision of vessels, where the damage has been in consequence of mutual negligence.

In *Vanderplanck v. Miller*, which was a "running down" case, that learned judge, in summing up to the jury, said:—"If there was want of care on both sides, the plaintiffs cannot maintain their action; to enable them to do so, the accident must be attributable entirely to the fault of the crew of the defendants." On another occasion, at *Nisi Prius*, in an action for the negligence of defendant's servant in managing his barge, whereby the plaintiff's barge was run down and sunk, Lord Tenderden

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said: "The plaintiff, in this case, complains of an injury to his barge through the negligence of the defendant's servants. If the accident happened from the state of the tide, or from any other circumstances which persons of competent skill could not guard against, the plaintiff is not entitled to recover; and so if the plaintiff's men had put this barge in such a place that persons using ordinary care would run against it, the defendant will not be liable. Nor will he be liable if the accident could have been avoided, but for the negligence of the plaintiff's men in not being on board his barge at the time when it was lying in a dangerous place. The only case in which the defendant is answerable is, if the accident arose from the negligence or want of skill in his own men." In an action in the Exchequer, for running down a vessel, Bayley, B., said: "The rule is, that the plaintiff could not recover if the ship were in any degree in fault, in not endeavoring to prevent the collision. Here the plaintiff had a right to presume that the defendant's ship would do that which she ought to do. I quite agree that if the mischief be the result of the combined negligence of the two, they must both remain in *statu quo*, and neither party can recover against the other." Angell on Carriers, § 635.

Lord Tenderden, in his Treatise on Shipping, says: "Two things must concur to support this action: a collision by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Abbott on Shipping, Boston edition of 1846, p. 312.

This is the settled doctrine of the American courts, and, as such, has been recognized and affirmed by our own Supreme Court in a series of decisions.

Carlisle v. Holton, 3 An. 48 and cases cited.

Murphy v. Diamond, 3 An. 441.

Myers v. Perry, 1 An. 382.

Edgell v. Barrataria & Lafourche Canal Co., 6 An. 425.

Professor Parsons says: "We take a common carrier to be one who offers to carry goods for any person between certain termini or on a certain route; and he is bound to carry for all who tender to him goods and the price of carriage, and insures those goods against all loss but that arising from the act of God or the public enemy; and has a lien on the goods for the price of carriage. These are essentials; and though all or any of them may be modified, and, as we think, may be controlled, by express agreement, yet, if either of these elements is wanting from the relation of the parties, without any such agreement, then we say the carrier is not a common carrier, either by land or water." *Maritime Law*, p. 174, vol. 1.

In *Caton v. Rumney*, 13 Wendell, 387, and in *Alexander v. Greene*, 3 Hill 1, it was expressly decided that steam towboats are not common carriers. See *Smith v. Pierce*, 15 La.; *Davis v. Housen*, 259, 6 Rob.

So in *Wells v. Steam Nav. Co.*, 2 Comst. 204.

Leonard v. Henderson, 18 Penn. 40.

See, also, Story on Bailments, § 496.

Angell on Carriers, § 86.

Those who, as a public employment, undertake the carriage of inanimate objects, either by land or water have the object bailed exclusively

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in their own possession, and under their own power and control—out of the view and custody of its owner—therefore, it is but reasonable that they should be held to strict care and strict accountability. Lord Holt, in the celebrated case of *Coggs v. Bernard*, says: "The law charges this person, thus entrusted to carry goods, against all events, but the acts of God and of the enemies of the king. For, though the force be never so great as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust to these sort of persons, that they may be safe in their dealings. For, else, these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." Story on Bailments, § 490.

The carrier is a bailee for hire, and it is of the essence of the contract of bailment that the object bailed should be delivered. Story on Bailments, § 2.

Hennen for Ship et als.—The obligations of the owners of towboats to shipowners, are those of common carriers. *Smith et als v. Pierce et als.* 1 L. 354-5.

The Court says: "By the contract for towing, he is bound to carry them safely to their destination, *unless* prevented by UNCONTROLLABLE ACCIDENTS, or such as are not within the CONTROL OF HUMAN FORESIGHT OR POWER."

The undertaking is to tow the vessel in safety, and he has a right to assume all the authority necessary to effect that purpose. The command and care of the vessel towed should either be subject to his command whilst she is carried by his boat, or her rudder should be placed in the hands of one of his own men. We consider a vessel thus towed as *property carried for hire*, in which her crew should not be viewed as having any lawful agency.

They had, as common carriers, the entire control over the Orozimbo; that if there was any misconduct or neglect on her (which is denied and disproved by the evidence), it is the act of the common carrier. See *Smith v. Pierce*, 1 L. 357.

LESLIE, J. These two cases were tried together in the lower court, almost on the same evidence adduced in each.

The facts are correctly stated by the Judge of the Fourth District Court of New Orleans, and are as follows:

On the 6th of January, 1859, whilst the ship Digby was attempting to cross the bar, at the South West Pass, under sail, she grounded on the bar, and whilst so aground, the towboat C. Vanderbilt, having in tow astern the ship Orozimbo, attempted to pass the Digby, which was lying across the channel, and in so doing the Orozimbo was brought into collision with the Digby, whereby both the Digby and Orozimbo were seriously damaged. The owners of the Digby claim, that the collision was occasioned by the fault and neglect on the part of the officers and crews in charge of both of the Orozimbo and the towboat Vanderbilt, whilst the

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owners of the Orozimbo claim that the collision was attributable to the fault of the Digby and the Vanderbilt, thus presenting (as the Judge appropriately observes) a species of triangular crimination.

Two separate judgments were rendered in the lower court; one in the suit of *John Creen, Master, &c., v. E. Francisco Croce, et al.*, and the owners of the Digby against *Hyde & Mackie*, owners of the Vanderbilt, *in solido*, for the sum of \$613, with interest and costs, and in the same suit in favor of *E. Francisco Croce*, master and owners of the ship Orozimbo, also defendants therein, discharging them from liability, and the other judgment in the suit of *E. F. Croce, Master, et al. v. The Vanderbilt et al.*, in favor of the plaintiffs for \$955, with interest and costs.

Hyde & Mackie took a suspensive appeal from both judgments, and it was agreed that one transcript should serve both appeals, and that the case as between *Creen & Croce*, the Digby and the Orozimbo, should be examined and decided apart by this court without a formal appeal on the part of the former, and in the same manner as if an appeal had been regularly taken.

Before proceeding to an examination on the merits of these consolidated cases, we will dispose of two bills of exception, taken by *Hyde & Mackie* to the reception and rejection of certain evidence on the trial of these cases.

The first was to the overruling of the objection made by them to the evidence of *John Creen*, on the ground that he was the party-plaintiff to the record in his suit against them, and as such liable for the costs of suit.

As a general rule, the objection would have certainly been a valid one; but as the witness was merely a nominal party to the suit, and disclaimed any personal interest therein, we do not think such an objection could deprive the real parties in interest of the benefit of his testimony, and the Judge of the lower court did not err in receiving it.

The second bill of exceptions was, to the refusal of the court to receive in evidence a certain private book, made a part of the bill, in connection with the testimony of Captain Smith, that the same contained the rules and regulations of the several towboat companies, with regard to their charges and responsibilities, and also to prove that said books were extensively circulated and were well known to the commercial community, particularly to those engaged in the Shipping business. For the reasons stated in the bill, and in accordance with the ruling of Mr. Justice Story, in the case of the schooner *Reeside*, 2 Sumner 567, the said book and explanatory evidence was properly rejected.

On the merits, the evidence in these cases, as is usual in kindred cases, is conflicting; but, after a very careful examination of the whole evidence in the record, it is, we think, satisfactorily shown, that the collision between the Digby and the Orozimbo was not occasioned by *force majeure*, but by the fault, negligence, carelessness, unskilful management and obstinacy of the master of the Vanderbilt, who, regardless of the peril of attempting to pass the Digby, with a ship in tow astern, which was held by a hawser of some forty fathoms long, nevertheless, in spite of repeated warnings and remonstrances from persons on the Digby and the Orozimbo, persisted in making the attempt, as appears by the combined testimony of *Creen, Patterson, Ferris, Daws* and *Jackson*. Had the master of

the Vanderbilt let go the hawser which held the Orozimbo to his vessel, as he was requested and urged to do by the pilots of both boats, or stopped when only at the distance of one hundred and fifty yards, the accident would not have happened. See evidence of *Jackson*.

The danger of an imminent collision should have been manifest to an experienced navigator. The channel was very narrow, and the sheer taken by the Orozimbo in the eddy, naturally resulting from the Digby's position in the channel, was the natural result of the reckless attempt made by the Vanderbilt. Had the master of the Vanderbilt, even when the danger of collision became imminent, displayed ordinary skill as a navigator, the collision might still have been averted. He controlled the situation, and had he cast off the hawser, or anchored in time, no collision would have taken place.

Neither the Digby nor the Orozimbo were to blame for the collision; for, as the Judge of the lower court properly observed, the Digby had the right to come on to the bar with either sail or steam, at her option, and no law or regulation exists to control her in this respect. She being aground was her misfortune; but as she was in that condition and entirely helpless, it was the bounden duty of all other vessels to do her no harm. See *Sauvé v. Beckwith*, 9 La. 430; *Story on Bailments* 386.

As to the Orozimbo, she was merely a passive agent, with no present motive power save that received from the Vanderbilt, and made repeated attempts to be cut loose from her.

The case of *Bestoso v. U. S. Mail Co.*, 9 Ann. 268, establishes the principle by which a case like this should be governed.

If the accident was an unavoidable one, with due precautionary measures, it was incumbent on the defendants, *Hyde & Mackie*, to show this exculpatory fact; but, on the contrary, the record is full of proof that the whole damage inflicted on the Digby and Orozimbo, was occasioned by the wilful obstinacy, fault and negligence of the master of the Vanderbilt. *Saurie v. Tourne & Beckarts*, 9 La. 428.

The cases are fully made out, and the defendants, *Hyde & Mackie*, who are proved to have been the owners of the Vanderbilt when the collision occurred, are responsible, as common carriers, to each vessel for the damage sustained by it. See Art. 2294, C. C.; *Smith et al. v. Pierce et al.*, 1 La. 350; *Davis v. Housen*, 6 Rob. 256; *Millaudon v. Martin*, 6 Rob. 541; *Burges v. Beebe*, 3 An. 668. See Acts of State Legislature, 1855, R. S., sec. 1, p. 537.

The master and owners of the Orozimbo were properly exonerated from all liability to the Digby, as they were in no way to blame for the collision with that vessel.

It is therefore ordered, adjudged and decreed, that the judgments rendered in the suit, *John Creen, Master, &c., v. E. Francisco Croce*, and in that of *E. A. Croce, Master, &c., v. Towboat Vanderbilt*, consolidated, be, and the same are hereby affirmed, the costs of appeal to be paid by *Hyde & Mackie, in solido*.

JONES, J., absent.

GREEN ET AL
v.
CROCE ET AL.

SUPREME COURT OF LOUISIANA.

WALLACE LITHGOW & Co. v. CHARLES BYRNE.

A mandate must be express in order to sue out a writ of sequestration.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J. Whitaker, Fellows & Mills*, for plaintiffs and appellants. *A. Lothrop*, for defendant.

Whitaker, Fellows & Mills, for appellants.—The question resolves itself into this: What evidence of agency is required under Art. 276 C. P., to authorize a writ of sequestration based on the agent's affidavit? It will be noticed that Art. 276 does not declare that any evidence as to the fact of agency beyond the affidavit itself is necessary; and it is respectfully submitted that such affidavit is sufficient. It is a well settled rule, applicable to conservatory process, that the affidavit is *prima facie* evidence of the facts authorizing the writ. This principle is fully recognized as late as the case of *Jane W. Johnston v. Geo. W. Johnston*, 13 An. 581.

The defendant offered no evidence to rebut or contradict this *prima facie* proof, which it was necessary, as stated by the court in the above case, for him to do.

The error of the learned District Judge, it is respectfully submitted, arose from the fact that he viewed the additional and subsequent approval of the agent's acts, by the plaintiffs, as the only evidence of agency, not considering that since proof was intended only as corroborative of the *prima facie* proof—the affidavit—and not as substantive proof.

HYMAN, C. J. Plaintiff appealed from the judgment of the lower court, setting aside, on motion of defendant, a writ of sequestration issued in this case.

One of the grounds of the motion is, that the affidavit for sequestration is informal and insufficient.

William Pyne, who is no party to this suit, made the affidavit; but in no part thereof does he state that he had authority from plaintiff to make such an oath.

There is no allegation in the petition stating such agency; nor any evidence whatever thereof.

Such agency must be special (see Civil Code 2966), and there must be evidence thereof produced to the court, by affidavit or otherwise, before a writ of sequestration can be sued out by an agent.

Judgment affirmed, with costs.

HOWELL, J., recused.

JONES, J., absent.

TERTULLIAN VILLA v. L. F. JONTE, et al.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. Budd & Lambert* for plaintiff. *Reynolds & Davidson* for defendants.

HYMAN, C. J. The plaintiff sued the defendants, *L. F. Jonte and Abraham Parker*, as partners of the late commercial firm of *L. F. Jonte & Co.*, for the sum of six hundred and sixty-three dollars and nineteen cents, balance due on open account.

The defendants filed separate answers; both denied the indebtedness, and the partnership as alleged.

The lower court gave judgment in favor of plaintiff against defendants, *in solido*, for the amount sued for, with legal interest from the 6th day of May, 1859, the date of judicial demand.

From this judgment the defendant, *Parker*, has appealed.

We have examined carefully, the evidence. It establishes that such a partnership existed, as alleged by plaintiff, that defendants were members of that partnership, and that as such, they are indebted, *in solido*, to the plaintiff in the sum claimed by him.

There is no error in the judgment rendered by the lower court.

Judgment affirmed, with costs.

JONES, J., absent.

W. H. LETCHFORD, et als. v. SHIP GOLDEN EAGLE, et als.

In a contract of affreightment, where the defendants expressly allege and clearly prove that the damage to goods was caused by stress of weather and dangers of the sea, beyond their control, they will not be held liable.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. E. W. Huntington* for plaintiffs. *Benjamin, Bradford & Finney* for defendants.

JONES, J. The defendants sue the plaintiffs, as common carriers, for damages done to their goods shipped from Havre to the port of New Orleans. The proof shows that the vessel on which the goods were shipped was seaworthy and with a sufficient crew.

It is also shown that the goods were well stowed, but the damage occurred to the goods on the voyage. The contract of affreightment rendered defendants *prima facie* liable, and throws the burden upon them to allege and prove that they are within some exception of law that exonerates them from liability.

Their answer expressly alleges that if any damages occurred to plaintiff's goods during the voyage, it was from stress of weather and the dangers of the seas, for which these defendants are not responsible.

We think that defendants have by clear proof established that whatever injuries were suffered by plaintiffs, occurred by stress of weather and dangers of the sea, without any fault attributable to defendants.

Judgment affirmed.

LABAUE and HOWELL, J. J., absent.

ADAM BEATTY, *v.* SCHWARTZ, KAUFFMAN & Co., et als.

Damages will be allowed for a frivolous appeal, when prayed for by appellee in his answer.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
G. Schmidt for plaintiff. *Whitaker, Fellows & Mills* for defendants
and appellants.

JONES, J. This is a suit by the holder of a draft against the acceptor. The defence and call in warranty have failed for want of proof. This is evidently an appeal for delay, and as the appellee has, in his answer, prayed damages for frivolous appeal, the same must be allowed.

Judgment affirmed, with costs of appeal, and the sum of one hundred and sixty-eight dollars for frivolous appeal.

LABAUVE and HOWELL, J. J., absent.

JAMES BILLEN *v.* J. R. WHITE.

Where there is positive evidence of the loss of an instrument in writing parol testimony will be received proving its contents.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Whitaker & Fellows for plaintiff and appellant. *Johnson & Denis* for
defendant.

HYMAN, C. J. Plaintiff sued defendant to recover the sum of \$1,400 with interest, the price paid for the purchase of an unsound slave.

Defendant answered by general denial, but admitted the sale of the slave to plaintiff.

The District Judge rendered judgment in favor of plaintiff for amount claimed, with interest.

Defendant has appealed.

Defendant, in the lower court, objected to the admission of the testimony of George W. West, proving the contents of a written instrument.

The ground of the objection was that the loss of the instrument was not sufficiently proved.

There is positive evidence that the instrument of writing was destroyed. The evidence was properly admitted.

There is no reason to reverse the judgment of the lower court.

It is affirmed, with costs.

HOWELL, J. recused.

JONES, J. absent.

W. R. BELL v. WM. BLACK, et. al.

A co-defendant cannot be made a witness against the plaintiff.
 A plaintiff must make out a clear case before a court of justice.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
C. Roselius & Alfred Phillips for plaintiff. *Robert Mott* for defendants and appellants.

LARAUTE, J. The plaintiff, a livery stable keeper, hired a horse and buggy to the defendants in July, 1857, for a drive on the shell road; the horse suddenly died in the buggy on the way. The plaintiff alleges, in substance, that the death of the horse was owing to the careless and negligent management, and by wilful and reckless driving, said Black and O'Leary injured said horse, so that he died from the effects and results of said driving. He claims \$400 for the value of the horse, and \$9 for the hire of the horse and buggy, one shaft broken, and bringing the buggy home; in all \$409. The court below, after hearing the testimony, gave judgment for plaintiff for the amount claimed, with interest; from this judgment defendants appealed. The defendants answered separately: Black admits the hiring, and says that his co-defendant had nothing to do with the hiring; that O'Leary was his invited companion to ride with him to the Lake. O'Leary denies the allegations in the petition, &c. On the trial below, Black offered his co-defendant, O'Leary, as a witness, on the ground that there was no testimony going to charge O'Leary in any way in the case. The court rejected the witness, on the ground that he was a party in the suit. We think the court did not err. We have carefully examined the testimony in the record, and we have not found that plaintiff has proved his allegations charging the defendants with careless and negligent management, and wilful and reckless driving of the horse. It is true that the horse died suddenly on the way, but there is no testimony showing that it was owing to the neglect and fault of the defendants.

It is a well settled rule of law, that a plaintiff must make out a clear case to support his action before a court of justice. We are of opinion that plaintiff has failed to bring his case within that rule.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed. That plaintiff's demand be dismissed, and that he pay costs in both courts.

JONES, J., absent.

BOWKER & EDMONDS v. JAMES CONNOLLY & Co.

Where a firm makes advances on consignments, they cannot be required "to forward them to third persons subsequently, and thus be deprived of their privilege.

A PPEAL from the Fourth District Court of New Orleans, *Price, J. Bonford, Singleton & Clack* for plaintiffs and appellants. *Roselius & Phillips* for defendants.

LABAUVE, J. The plaintiffs state in their petition that, in the year 1858 and before, they were in commercial business with Powell & Co., of St. Louis, who were large shippers of flour and Western produce, to New Orleans and to Eastern market. That the course of business was, for the house of Powell & Co. to make shipments to the consignments of petitioners at Boston, by way of New Orleans, transmitting to them the river bills of lading and drawing drafts against the shipments. That, as the voyage from St. Louis to Boston was performed partly in steamboats, on the Mississippi river, to New Orleans, and partly in sea-going vessels, from New Orleans to Boston, the defendants were constituted agents for transmission, and that among the shipments so made were 721 barrels of flour, shipped on the steamer T. L. McGill, on the 9th of September, 1858, and also 123 barrels of flour, branded "Lacide Mills," shipped on the steamer Stephen Decatur; both of said shipments having been made in the course of business between Powell & Co. and petitioners, to the order of said Connolly & Co. That said Connolly and Co. received said two shipments, but refused to forward the same to petitioners. That they have accepted drafts drawn by said Powell & Co. against said shipments, and that there is a large balance due them for advances; that said shipments were worth \$8,000, and that they have sustained damages in the sum of \$1,000, by the neglect of said Connolly & Co.

They pray that the said Connolly and Co. be decreed to deliver the said lots of flour so shipped by the steamers T. L. McGill and Stephen Decatur, or to pay \$8,000, together with the \$1,000 damages.

The defendants answered by a general denial, but admitted that, during the year 1858 and before, Powell & Co. of St. Louis made shipments of flour and other articles of Western produce to them, to be sold by respondents on account of said Powell & Co., and that upon the faith of said shipments, respondents made advances to and accepted for said Powell & Co. That when they received the lot of 721 barrels of flour, as well as the bill of lading therefor, there were no advices to forward the same to plaintiffs, but that the same was regularly consigned to respondents, to be sold on account of said Powell & Co. Defendants advanced and accepted for said Powell & Co., on the faith of said lot. That the lot of 123 barrels, per Stephen Decatur, was not received by them before the 1st November, 1858, when the same became subject to the order of the court, in garnishment process served previously, about 30th October, 1858, on respondents, in the suits of *Osborne & Tolle v. Powell & Co.*, No. 12819 on the docket of Fifth District Court of New Orleans. That said Powell &

Co. are largely indebted to respondents for advances and acceptances, made on the faith of said shipments, and that they have a privilege on said flour over all others. In a supplemental answer, they say that, of the 721 barrels, 53 were sold, netting \$221 08, placed to the credit of said Powell & Co. That in November and October, 1858, the remaining 668 barrels were attached, in the suits of *Osborne & Tolle v. Powell & Co.*, and *Clark, Brothers & Co. v. Powell & Co.*

The testimony and admission in the case show that said Powell & Co. wrote a letter, dated St. Louis, September 9, 1858, addressed to plaintiffs, in which they say, among other things: "We have now to hand your four barrels, lading per T. L. McGill, of 721 barrels of flour. This is shipped to you through the usual channel in New Orleans. The certificate of insurance on the shipment we will hand you when we next write, noting our draft on you of this date, at sixty days, for \$4,000." On the 10th September, 1858, said Powell & Co. insured 1,021 barrels of flour, shipped per steamer T. L. McGill, loss, if any, payable to Messrs. Bowker & Edmonds, Boston, Massachusetts.

It is admitted this letter and the certificate of insurance were received by plaintiffs in due course of mail, and that the draft mentioned in this letter was duly accepted and paid. On the 20th October, 1858, said Powell & Co. insured 123 barrels of flour, to be shipped by steamer Stephen Decatur from St. Louis, loss, if any, payable to Messrs. Bowker & Edmonds, Boston, Massachusetts. It is admitted that this certificate of insurance was received by the plaintiffs in due course of mail.

The evidence shows that in the year 1858, there was a large business done in Western produce between the said Powell & Co., shippers, and the defendants, as consignees, who sold the same on account of the shippers; that said Powell & Co. were in the habit of drawing against the same on said defendants, who were also in the habit of accepting and paying the drafts of said drawers; that said Powell & Co., who occasionally made shipments, by way of New Orleans, to said plaintiffs, to the consignment of said defendants, who reshipped by sea-vessels to the plaintiffs. In regard to the shipments made by said Powell & Co., the correspondence was direct between said Powell & Co., shippers, and said plaintiffs, who received through mail the bills of lading and certificates of insurance from said Powell & Co., and that the defendants were mere transmitting agents. Whenever shipments were intended for the plaintiffs, said Powell & Co. were to give particular instructions to said defendants to that effect. In a letter dated St. Louis, 17th April, 1858, addressed by said Powell & Co. to the defendants, they say:

"We are awaiting further advices from you, which will note, we presume, sale of our shipment per the 'Illinois,' and in this connection we would say, that whenever we intend a shipment to go forward to New York or Boston, we make a minute to that effect with instructions at foot of bill of lading, so that there may arise no delay in shipment, and by this you may be governed hereafter."

The bill of lading, dated St. Louis, 9th September, 1858, for the seven hundred and twenty-one barrels of flour, shipped per steamer T. L. McGill, by said Powell & Co., consigned to said defendants, who introduced it in evidence, contains no instruction to forward said lot of flour

BOWKER & Co. to the plaintiffs. This lot of flour, per the steamer T. L. McGill, is the one in dispute. Another bill of lading, dated 10th September, 1858, for another lot of flour of three hundred barrels, shipped per same steamer, by Powell & Co., to said defendants, who introduced said bill of lading in evidence, contains at the foot instructions to forward to the plaintiffs, to-wit:

"Please receive the above and forward same for our account to Messrs. Bewker & Edmonds, Boston, by some small vessel having quick dispatch. Should you be able to sell it in New Orleans, however, at 7@7½ per barrel, on arrival, you are authorized to accept that figure, in which event please remit proceeds to Boston. Yours, truly, "POWELL & Co."

Here the understanding between these parties is carried out for one lot as to instructions, and we presume it has been complied with, as there is no dispute about this lot. It is in evidence that two said bills of lading and two lots of flour were received by the defendants about 21st September, 1858, one with and the other without instructions. What could be, then, the action of the defendants in regard to the disposition of the flour? It follows, as a matter of course, that they forwarded accordingly the lot of three hundred barrels, or proceeds, to destination, and the other lot of seven hundred and twenty-one barrels they considered as consigned to themselves, to be disposed of in New Orleans, for account of said Powell & Co., and upon the faith and credit of which they accepted, as proven, two drafts of said Powell & Co., one for \$1,000, on the 21st September, 1858, and the other for \$3,000, on 24th September, 1858. Besides these drafts, the said Powell & Co. were indebted to the defendants, by cash balance above, \$7,000 on the 21st September, 1858, it being the time of the receipt of the flour by the steamer McGill. The bill of lading, dated St. Louis, 19th October, 1858, for the one hundred and twenty-three barrels of flour shipped per steamer Stephen Decatur, by the said Powell & Co. to the defendants, contains no instruction to forward the same to plaintiffs.

Upon the whole, we think the Judge below decided the case correctly. We have not been favored with briefs of counsel on either side; the plaintiffs and appellants have made no appearance in this court.

It is, therefore, adjudged and decreed that the judgment of the District Court be affirmed, with costs.

E. W. G. BURBANK, Curator, v. PAYNE & HARRISON.—JAMES L. ARBUTHNOT, Appellant.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.

It is the deliberate opinion of this court that the powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions.

Fiduciary agents cannot transfer negotiable assets without an order of court.

A PPEAL from the Second District Court of New Orleans. *Morgan, J. Whitaker, Fellows & Mills* for plaintiff. *Benjamin, Bradford & Finney* for defendants. *Carleton Hunt* and *J. H. Kennard* for Arbuthnot.

LIALEY, J. The plaintiff in this case, acting as the curator of the vacant succession of Robert Woodsides, who died in the parish of Assumption, in this State, where his succession was duly opened, instituted suit in the Second District Court of New Orleans against Payns & Harrison, claiming from them certain funds in their hands belonging to the succession of Woodsides.

The defendants, by their answer, admitted that they had in their hands, standing to the credit of the deceased Robert Woodsides, the sum of \$521 17, and that they also hold a further sum of \$5,000, which, they say, was deposited with them some time about the 13th March, 1860, by one Seth Kline, and for which they issued a certificate payable to the said Robert Woodsides, or to his order. They further represent that they believe that the said certificate is held by one J. L. Arbuthnot, who resides in Mississippi, at Woodville, who has specially notified them not to pay the said deposit nor balance of account to any one but him, in his capacity of administrator of the said Robert Woodsides, duly appointed by the proper court, in the State of Mississippi, where the deceased was domiciliated. They express their willingness to pay the several sums claimed of them, upon return of the certificate of deposit issued by them, and they pray for the appointment of a curator *ad hoc* to represent the said J. L. Arbuthnot in the suit pending.

The curator *ad hoc* answered, claiming the whole amount in controversy, as administrator of the estate of of Robert Woodsides, under appointment of the Probate Court of Wilkinson county, Mississippi, in which capacity the certificate of deposit was received by him, and which certificate is in the following words:

"Received of Seth Kline five thousand dollars, subject to the order of Robert Woodsides, to be at his credit on account.

[Signed]

PAYNE & HARRISON,

J. L. ARBUTHNOT, Administrator.

New Orleans, March 30th, 1860."

On the trial of the case in the court below, both the plaintiff and J. L. Arbuthnot produced their respective letters of administration, and the defendants, Payne & Harrison, being mere stakeholders, the contest is exclusively between the Louisiana curator and the Mississippi adminis-

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trator. It is conceded, for the purpose of arriving at the real issue in this case, that Robert Woodsides, at the time of his demise in Louisiana, had his domicile in Wilkinson county, in Mississippi, and that his estate there, and his succession here, were properly and legally opened in both States.

That the Louisiana succession was properly opened, does not admit of a doubt. It was a case specially provided for in the Act of the Legislature passed on the 16th March, 1842, section 1.

And as regards the independent action of succession so opened, the opinion of the court in *Atkinson v. Rogers*, is directly in point. It is there held: "The plea to the jurisdiction of the courts of this State, on the ground that the succession of T. W. Griffen had been opened in Amite county, in the State of Mississippi, is not good in law. When a person dies, leaving property in two or more States or countries, his property in such State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto."

It is the deliberate opinion of this court that the powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions. And had any exception been taken to the right of the Mississippi administrator to stand in judgment in the case, we should, without hesitation, have maintained it, but as it is, we shall proceed to the examination of the issue presented:

The broad question presented now for solution is, whether the fund held by Payne & Harrison is assets in the Louisiana succession, or in the Mississippi estate. It is urged by the curator that the money, being on deposit in the State of Louisiana, at Woodsides' demise, it is, to all intents and purposes, an asset of the succession under his administration; whilst, on the other hand, the administrator contends that the certificate of deposit, as he terms it, being in a negotiable form, and in his possession, belongs to the Mississippi estate. Were this instrument in the hands of a *bona fide* endorsee from the administrator, claiming the amount of this fund, the question then might arise, whether it was transferable by endorsement, and whether the endorsement could be legally made by the administrator—whether a payment of it made to an assignee would be a valid one? But, as it is the administrator himself who is prosecuting the claim, is it not competent for the court to ascertain the nature of the title he sets up, and how and when he acquired it? Woodsides died on the 14th March, 1860, one day after the money was deposited with Payne & Harrison, by Kline; so that, at his death, that sum, with the balance previously to his credit on the books of that house, formed a part of his succession in Louisiana. It is not shown when the evidence of the deposit by Kline was taken out of the State, and it is therefore reasonable to presume it was in this State when the succession was opened here. It was in the hands of Kline a receipt to him, showing that he had paid that sum for Woodsides, and that it was subject to Woodsides' order. He might have retained this receipt for his own protection, without committing himself with Woodsides, who would not, for that cause, have

been precluded from claiming any amount due to him on general account by Payne & Harrison, and his paid drafts on, or receipts to them, would have discharged them from liability. There was no condition on the face of the receipt, which made the payment of the fund dependent on its production, which is usual in certificates of deposit made to order. If Kline was willing to give up the receipt, he should have done so to some person who was authorized to receive it; and, certainly, the only proper person to receive it was the curator here; and the mere adventitious circumstance of its having found its way into the hands of the administrator, does not, we conceive, vest in the estate in Mississippi the fund in Louisiana, payment of which might have been exacted, with or without the production of the receipt.

It is strenuously contended that it was competent for the administrator, under the law of Mississippi, to negotiate this instrument, and that it was, therefore, practically and legally, an asset of the Mississippi estate.

We see nothing in the law of Mississippi, which is spread on the record, to show that fiduciary agents can assign moneyed instruments.

Reference is made on this point to the rulings of the courts of New Hampshire and Massachusetts; but, in the absence of any *lex loci contractus*, we shall give effect in preference to the ruling of our own courts on that subject. See *Nicholson v. Chapman*, 1 An. 22. It is here held that fiduciary agents cannot transfer negotiable assets without an order of court; and there is no certainty that any such an order would ever be granted. If the amount of the receipt could be paid to the administrator at all, it would not be solely on account of its being a negotiable instrument, but because he could give a *valid* discharge for payment of it made to him, which we do not think he could.

It is therefore ordered, adjudged and decreed, that the judgment of the Court below be affirmed, costs of appeal to be paid by appellant.

SUPREME COURT OF LOUISIANA.

BROMBERG & SON v. HYDE & GOODRICH.

For the deprivation of the use and occupation of a store, on a claim for consequential damages, plaintiffs must establish the facts, and also the extent of damages suffered thereby.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
A. Robert for defendants and appellants. Michel & Koontz for plaintiffs.

JONES, J. The plaintiffs sue defendants for the use and occupation of a certain store, of which it is alleged that they were illegally deprived of the use and possession by the defendants. Consequential damages are also claimed in the petition. The defence is a general denial. Collateral issues have been presented, which we shall wholly disregard.

In order to entitle the plaintiffs to a recovery, they must establish that, under the law and the evidence, they were entitled to the store in controversy; and that defendants, by their illegal acts, deprived the plaintiffs of the enjoyment and possession thereof, and also the extent of damages suffered thereby. The right of the plaintiffs to the possession is established beyond controversy, and the infringement of that right is fully established by the evidence, to the extent of the judgment obtained in the lower Court. It is, therefore, ordered that judgment be affirmed.

LABAUVE and HOWELL, J. J., absent.

P. J. COCKBURN v. J. R. GROVES & Co.

We are the appellants; do not claim damages by his answer for a frivolous appeal, none can be granted.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
A. G. Semmes, for plaintiff. Hays & Adams and E. W. Moise for defendants.

ILSLEY, J. The defendant James M. Wilson, endorser of a draft drawn by J. T. Semmes, on J. R. Groves & Co., and by them accepted, has appealed from the judgment rendered against him in said suit by the Fourth District Court of New Orleans.

The draft was not paid by the acceptors, whereupon it was duly protested for non-payment, and legal notice thereof served on the defendant Wilson, in person.

The appeal is a frivolous one, taken solely for delay; but, as the appellee has not claimed damages by his answer, as required by Art. 907 C. P., we cannot condemn the defendant to pay any.

It is therefore ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs, and that the appellant pay the costs of appeal.

HOWELL, J., absent.

ARTHUR CHOPPIN v. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

Employers are answerable for the damage occasioned by their servants, in the exercise of the functions in which they are employed.
 Damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
C. Roselius, for defendant and appellant. *Durant & Hornor*, for plaintiff.

Roselius for defendant.—Lord Tenterden laid down the rule, in the case of *Venderplank, et al. v. Miller, et al.*, 22 English Common Law Reports, p. 280, as follows:

"If there was want of care on both sides, the plaintiffs cannot maintain their action; to enable them to recover, the act must be attributable entirely to the fault of the crew of the defendant's vessel."

The Supreme Court of this State has recognized and applied this rule to every case of railroad collision or accident that has come before it. *Lesseps v. Pontchartrain R. R. Co.*, 17 L. R. p. 361. *Fleylas v. The Same*, 18 L. R. p. 339. *Hubgh v. Carrollton R. R. Co.*, 6 A. R. 496. *Damont v. same*, 9 A. R., 441. *Hill v. Opelousas R. R. Co.*, 11 A. R. p. 292. *Myees v. Percy, et al.*, 1 A. R. p. 374. *Carlisle v. Holton, et al.*, 3 A. R. p. 48. *Murphy v. Deamond*, 3 A. R. p. 441 *et seq.*

HYMAN, C. J. Plaintiff claimed a judgment of \$50,000 against defendant, the New Orleans and Carrollton Railroad Company, for damages suffered by him, from the culpable conduct of its servants.

The case was tried by jury, and verdict given in favor of plaintiff for twenty-five thousand dollars.

The District Judge rendered judgment in conformity with the verdict. A new trial was refused, and defendant appealed.

We have carefully examined the evidence, and it discloses the following facts:

On the afternoon of the 19th August, 1860, plaintiff was passenger on a train of cars belonging to defendant. While the train, conveying plaintiff, was at rest, at Jackson street, a regular stopping place, the express train of the company, running on the same road, came down the track towards the aforesaid train, at a rate of speed highly dangerous, displaying, on the part of those in charge, a culpable disregard of human life. Both trains were filled with passengers. Before plaintiff could escape, a terrible collision took place—the express train was hurled with destructive force against the train at rest, breaking some of the cars, injuring plaintiff in a dreadful manner and killing a child in his arms, whom he was endeavoring to save. Plaintiff's young life was almost crushed out, his bones were broken, his leg had to be amputated, and he is now a miserable cripple. He has endured long months of physical suffering, was deprived of an employment, his only means of subsistence, because of inability, after his misfortune, to perform the work required. All these evils have come upon him, not by his fault or even imprudence, but

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by the reprehensible acts and neglectful and careless conduct of the agents of the railroad company in running the train.

The company is responsible for the damage occasioned by their servants in the exercise of the functions in which they are employed. Civil Code, 2299.

Public carriers should take care of their passengers.

No exact computation can be made for damages due to plaintiff; and, in cases of this kind, much discretion is left to the judge or jury in the assessment of damages. Civil Code, 1928, § 3.

Considering the loss of plaintiff's employment, the painful nature of his wounds, the permanent character of his injuries, and his inability therefrom to perform such labors as before for his support, we conclude that the jury, in assessing the damages, did give such a reasonable sum as will really compensate plaintiff.

Judgment affirmed.

JONES, J., absent.

HOWELL, J., recused.

WILLIAM DURBRIDGE v. CHARLES WENTZEL, et al.

Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
G. J. McPheeters for plaintiff. *Alfred Philips* for defendants and appellants.

LSLEY, J. Charles Wentzel, the defendant, as assignee of one Letten, obtained judgment in the Sixth District Court of New Orleans against the plaintiff in this suit, for some \$1200, and before the expiration of the delay for appealing, Wentzel's attorney caused execution to issue on the judgment. In virtue of this execution, the sheriff seized Durbridge's deposits in bank, and for this alleged illegal proceeding Durbridge claims damages \$1,000, and \$150 counsels' fees.

The case was submitted to a jury, who awarded, on the first trial, \$400 to the plaintiff, but a new trial having been granted, it was again submitted to a jury, who rendered a verdict in favor of the plaintiff for \$100, and from the judgment rendered by the court on this verdict the defendants have appealed.

It is admitted, in the defendant Wentzel's answer, that the writ of *fiat facias* was issued before the expiration of the delay for a suspensive appeal; and the counsel of Wentzel, in his testimony, says that "execution was issued under the belief that, if it was not issued before the delay expired, I would never make the money."

It is not pretended that Wentzel is not responsible for the illegal and unwarrantable acts of his counsel in pursuing the course they did, and any denial of responsibility, which might be gathered from the answer, is met by the ruling in *Duperon v. Vanwinkle, Sheriff, et al.*, 4 Rob. p. 41. In that case, the sheriff was the agent selected by the law to represent the

defendants; whilst, in this, the attorneys who took out execution, were the agents of the defendant's own selection.

The act of seizing the defendant's property was a tortious one, and the jury were justified in giving the verdict they did, which we deem a reasonable one, and of which the defendant should not complain. *Keen v. Lezardi*, 8. L. 33. C. C. 2294. C. C. 1928, § 3.

It is therefore ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs of appeal.

HYMAN, C. J., absent.

HOWELL, J., recused.

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EUPHEME, f. w. c., et als. v. JULIETTE MARAN, et al.

A motion to dismiss an appeal for informality must be made within three judicial days after the record is filed in this court:

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J. P. Soule, Budd & Lambert* for defendants and appellants. *C. Dufour & H. Train* for plaintiffs.

HOWELL, J. A motion is made to dismiss this appeal on the grounds following, to wit:

1. No citation of appeal has been served on the appellees.
2. The appeal was not made returnable to the Supreme Court in proper time.
3. The certificate of the clerk is incomplete.
4. The transcript of appeal is incomplete.

We are of opinion that, according to the ruling of this Court in the cases of *Murray v. Bacon*, 7 N. S. 271; *O'Donald v. Lobdell*, 2 L. 299; *O'Reilly v. McLeod*, 2 A. 138; *Hall v. Nevill*, 3 A. 326; *Mitchell v. Lay*, 4 A. 514; *Temple v. Marshall & James*, 11 A. 613, and *Creevy v. Breedlove*, 12 A. 745, this motion comes too late, not having been made within three days after the record was filed in this Court. The record was filed on 21st March, 1860, and the motion to dismiss on 26th February, 1861.

The motion must therefore be overruled.

On the merits, we see no reason to disturb the judgment of the lower Court.

Judgment affirmed, with costs.

JONES, J., absent.

ADRINETTE, f. w. c., et als. v. The Same, et al.

HOWELL, J. For the reasons assigned in the case of *Eupheme, f. w. c. v. Same Defendants*, No. 6740, just decided, the motion to dismiss is overruled, and the judgment of the lower Court affirmed, with costs.

MARGARET HAUGHERY v. JOHN M. LEE.

Where there is no fixed price for a lease, or it be left to the award of a third person, unnamed and determined, the agreement was an essential ingredient to make it a legal contract.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J. Durant & Hornor* and *W. B. Lancaster* for plaintiff and appellant.

Fellows & Mills for defendant.—In a contract of lease, three things are absolutely necessary, to wit: The thing, the price, and the consent. C. C. 2640. And, by C. C., Art. 2639, the price must be fixed. Art. 2641. The price should be certain and determinate, and, if left to a third person named and determined * * * if he cannot or will not do it, there is no hiring. The contract would be null, if the price were left to be fixed by a person not designated. C. C. 2642.

In the case at bar, no price was agreed upon, no person was designated; and, as alleged in the petition, and an understanding that defendant should pay a reasonable rent, as the Judge, in the first instance says, "implies that it should be fixed by a person not designated."

For these reasons, and the fact that the affidavit does not set forth that the sum claimed is for rent, must sustain the rule. See 12 La. 490. 11 Rob. 280, and cases there cited. 7 An. 654.

LABAUVE, J.—This case involves a pure question of law, which must be examined and decided upon the face of the papers.

The plaintiff, after having alleged the indebtedness of the defendant to her, in the sum of \$820, states, as the consideration of the debt, "that said Lee, on or about the 20th day of October, 1859, went into possession of a residence, situated on Seventh street, between Nayades and Prytania streets, in the Fourth District of this city, and belonging to petitioner, on an understanding with petitioner that he should pay her a reasonable rent for said premises."

At the same time, she prayed and obtained upon her affidavit a provisional seizure against the furniture and effects of the defendant, as in a case of lease.

The defendant, on motion, obtained a rule upon the plaintiff to show cause, on the 10th of January 1861, at 10 o'clock, A. M., why the writ of provisional seizure herein issued, should not be set aside, on the grounds:

1. That the affidavit, upon which the said writ was issued, does not show that the amount claimed is for rent of the premises described in the petition.

2. It does not show that there was any lease of said premises to defendant.

3. That the claim, as set forth in the petition, is based upon the mere occupancy by defendant, of the premises, which does not give rise to such relations between the parties as to authorize a provisional seizure.

A fourth ground to the insufficiency of the affidavit, which it is unnecessary to notice.

The District Judge made the rule absolute, and set aside the provisional seizure, with costs. The plaintiff appealed from that judgment.

This rule is in the nature of a motion made on the face of the papers, thereby taking for true the allegations, for the purpose of trying the rule.

The question is, then, whether or not the understanding to pay a *reasonable rent* is a *fixed price*, a *price certain and determinate*. C. C. Arts. 2639-2641. We think there was no *price fixed* by the parties, as contemplated by law, nor was the price left to a third person named and determined. C. C. Art. 2642. If anything, it was left to be fixed by a person not designated, to persons called as witnesses in the suit to say what was a reasonable price; and then there might have been as many different prices as there were witnesses; therefore, there being no price fixed by the parties, or left to the award of a third person named and determined, the agreement wanted an essential ingredient to constitute a contract of lease. C. C. Art. 2640.

It is therefore adjudged and decreed that the judgment of the lower Court be affirmed, with costs.

HOWELL, J., being the Judge who decided the case below, took no part in this decision.

JONES, J., absent.

HAUGHERY
LEE.

LEWIS J. FRIGERIO v. MRS. JULIA D. STILLMAN.

Agreements will be construed by the acts of the parties making them.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Alfred Philips for plaintiff. *Field & Shackelford* for defendant and appellant.

LABAUVE, J. The plaintiff states in substance that, on the 1st June, 1857, he leased to the defendant a certain brick house, 110, 154, on Canal street, for the term of three years, commencing on the 1st November, 1857, for the yearly rent of \$2,000. payable monthly. That, being desirous to take possession of the premises on the 31st October, 1860, he had given notice to said defendant to remove from the same, and that, notwithstanding said notice and the lease being expired, she persisted in her occupancy. He prays for the possession of the house, etc.

The defendant admits the lease as stated in the petition, but she avers that, on the 1st of August, 1860, or thereabouts, she entered into a verbal contract of lease with petitioner, by which she was to retain the premises for the space of three years, commencing on the 1st November, 1860, and ending 31st October, 1863, on the same terms and conditions of her previous lease, with the exception that she was to pay \$3,000 for the first year; \$3,750 for the second year, and \$4,000 for the third year. That, after the said verbal contract, she made valuable improvements on the premises, by and with the consent of plaintiff. She prays to be dismissed, with costs, etc.

Plaintiff proved the lease and notice, as alleged by him in his petition.

On the part of defendant, *Eliza Stillman*, sister of defendant, and *Mary Farrell*, an employee, testified that, on or about the 1st August, 1860, the parties to this suit entered into a new contract of lease of the

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premises, for three years, commencing on the 1st November, 1860, \$3,000 for the first year, \$3,750 for the second year and \$4,000 for the third year; the defendant was to furnish her notes as before; the lease was to continue as before for three years upon the same terms and conditions, with the exception that the rent was to be raised. The plaintiff went before P. Lacoste, notary, to get him to draw the act of lease to Mrs. Stillman for three years, at the rate of \$3,500 for the first year, \$3,750 for the second year and \$4,000 for the third year, but as it was an average of \$3,750 per year, to draw the act at the rate of \$3,750 per year. The notary asked plaintiff if Mrs. Stillman had agreed to that; he said no; then the notary said he would not draw the act before he had seen her. After that, both plaintiff and defendant came to the notary's office. The notary asked her if she wanted to pass the lease on the last mentioned conditions; she said no; she would not pass it in that way, but would on the conditions first mentioned. Then the plaintiff said he would pass no lease at all, except a lease for one year, at the rate of \$3,500 a year. Mrs. Stillman consented to that. The lease was then drawn up for one year at the rate of \$3,500, she then refused to sign it, because the fixtures, such as shades, counters, etc., were comprised in the same lease, and that all the fixtures in the store belonged to her. Lacoste, the notary, says that the defendant never made any objection to the addition of \$500 to the \$3,000 for the first term. Two other witnesses, T. E. Camers and T. Abrahamson, had interview with plaintiff and defendant, while the passing of the act of lease was in negotiation before the notary, and they say that the defendant did not, during the whole time, raise any objection to the \$500 being added to the \$3,000. It must look improbable that, if the price for the first year was \$3,000 instead of being for \$3,500, she would not have made that objection, while she was raising objections to other small matters. The defendant pretended that she had a lease under the same conditions as before, except that the price was higher. It is in evidence, by the act of the lease entered into before, that the defendant executed her monthly notes to her own order and endorsed by herself for the whole time of the lease, and there is nothing in the record showing an attempt to execute her part of the alleged contract by offering her notes as before. Upon the whole, we are satisfied that the judgment appealed from is correct.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed, with costs.

HOWELL, J., the Judge who tried the case below, did not participate in this decision.

A. D. GRIEFF & Co. v. R. S. KIRK, et als.

Suretyship is restrained within the limits expressed and intended by the contract.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor for plaintiffs.

R. & H. Marr for defendants and appellants.—This is a rule upon the sureties on an appeal bond; and they have taken this appeal from a judgment condemning them to pay the debt, interest and costs demanded.

In the original action, A. D. Grieff & Co. recovered judgment against George H. Kirk and R. S. Kirk & Co., *in solido*. From this judgment R. S. Kirk & Co. appealed; and R. W. Adams & Co. became sureties in the appeal bond. This court reversed the judgment, and condemned R. S. Kirk, alone, to pay the debt demanded. See original judgment, R. 19, 20; decree of Supreme Court, 31, 32, 33.

Plaintiff caused execution to issue upon this judgment; and upon its return unsatisfied took a rule in the usual form upon the sureties in the appeal bond.

In answer to the rule, defendants plead:

1. That the execution was returned before the legal return day, and that such return is not sufficient to entitle plaintiffs to proceed against them.

2. That plaintiffs are domiciled in New Orleans; that the return does not show that any demand was made upon plaintiffs to point out property of the defendant, R. S. Kirk, and that the return, in this respect, is not sufficient.

3. That the judgment appealed from was rendered against R. S. Kirk & Co.; that defendants became sureties for R. S. Kirk & Co.; that the condition of the bond was, that R. S. Kirk & Co. should prosecute said appeal effectually; that the judgment appealed from, against R. S. Kirk & Co., was reversed; that no judgment has been rendered against R. S. Kirk & Co.; that the judgment rendered by the Supreme Court on the appeal was against R. S. Kirk, alone; and that defendants were not the sureties of R. S. Kirk, and are not liable upon the bond. R. 37, 38.

In a supplemental answer defendants plead that the firm of R. S. Kirk & Co., the appellants in the original suit, was composed of Robert S. Kirk, George S. Serrill, and William D. Smith. R. 46, 47.

1. The execution was issued on the 11th June, and made returnable in seventy days. It was actually returned on the 18th August. R. 33, 34, 35. We submit, upon the authority of *Woodruff v. Penny*, 12 Mart. 676, and *Burr v. Talman*, 10 Rob. 139, that the surety is not bound until the legal delay has expired; and that a return before the return day of the writ is premature as to him.

2. The Code of Practice, Arts. 726, 727, requires that demand shall be made of the parties to point out property. The return in this case shows that no demand was made upon either of the parties; the only demand mentioned in the return having been made upon plaintiff's attorney. There is no doubt of the necessity of a demand before the sheriff can return the writ. See 10 Rob. 138, in the case just cited; also, *Gayoso v.*

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Hickey, 4 La., 301; *Conway v. Jones*, 17 La. 416. Where the defendant cannot be found, as the court suggests in this last cited case, a *curator ad hoc* may be appointed to represent him, where he has no attorney of record. It seems strange that no inquiry was made of the counsel who appeared and filed an answer for the defendant R. S. Kirk. We submit, that where one of the parties is domiciled in the place at which the court from which the writ emanates is held, it is not sufficient to call upon his attorney to point out property. A. D. Grieff & Co., the creditors of Kirk, lived in New Orleans; and it was not using the diligence required by law, or a compliance with the textual provision of Art. 727, C. P., for the sheriff to call on their attorney. The return, in this respect, seems to us improper and defective, and not sufficient to authorize proceedings against the sureties.

3. It was proven by the testimony of *Weibling*, R. 48, that R. S. Kirk, George S. Serrill, and William D. Smith composed the firm of R. S. Kirk & Co., at the time of the acceptance of the draft sued on; and the record shows that R. S. Kirk & Co. were condemned in the original suit; that R. S. Kirk & Co. appealed; that the judgment against R. S. Kirk & Co. was avoided and reversed; and that judgment was rendered against R. S. Kirk. Has the conditional obligation of R. W. Adams & Co., as sureties in the appeal bond for R. S. Kirk & Co., become absolute?

The law favors the surety, and will not permit his obligation to be extended beyond its precise terms. *Canal Bank v. Hagan*, 1 An. 66. An undertaking to be responsible for R. S. Kirk & Co., is very different from an obligation to be responsible for R. S. Kirk alone. R. W. Adams & Co. expressly bound themselves as sureties for R. S. Kirk & Co.; and their suretyship cannot be extended so as to make them responsible for R. S. Kirk alone, because that would be more hazardous and burdensome to them than the suretyship to which they consented, and which alone they contemplated.

There are no presumptions against sureties. They can only be held to the contract as made, to the precise terms of their obligation. *Freeland v. Briscoe*, 3 An. 256; *Cartwright v. McMillen*, 3 An. 686. The precise obligation in this case is, "that R. S. Kirk & Co. shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them, etc., if they be cast in the appeal, otherwise that R. W. Adams & Co., their surety, shall be liable in their place." See Bond R. 29, 30. It follows that until R. S. Kirk & Co. are cast in their appeal, and a judgment shall have been rendered against R. S. Kirk & Co., which they shall fail to satisfy, there can be no breach of the precise obligation contracted by R. W. Adams & Co., the sureties; and they cannot be liable.

Who were the principals in this bond? Obviously not R. S. Kirk, but R. S. Kirk & Co., the ideal existence, composed of the several partners, who had, under that name, merged their individuality. In the bond no other person is named as principal or appellant; and until indebtedness and breach are established against R. S. Kirk & Co., by a judgment and failure to pay, plaintiffs can have no claim or demand against R. W. Adams & Co. The judgment against R. S. Kirk & Co., the judgment appealed from, the judgment with reference to which R. W. Adams & Co. bound themselves, having been reversed, the contingency upon which

they obligated themselves has not happened, and cannot happen; and the bond has become inoperative and of no effect.

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HYMAN, C. J. Plaintiff sued the commercial partnership of R. S. Kirk & Co., obtained judgment against it, and it appealed.

On appeal the judgment against the partnership was reversed; but a judgment was rendered against R. S. Kirk, one of the partners.

The securities on the appeal bond, R. W. Adams & Co., in answer to a rule served on them, at the motion of plaintiff, to show cause why they should not pay the judgment rendered on appeal, assigned for cause, that the condition of the bond was, that R. S. Kirk & Co. should prosecute effectually the appeal, that they were only securities of said partnership, that the judgment rendered against it in the lower court had been reversed on appeal, that the partnership of R. S. Kirk & Co. was composed of Robert S. Kirk, George S. Serrill and William D. Smith.

Judgment was rendered against the securities decreeing them to pay the judgment against R. S. Kirk.

The securities appealed.

Are the securities liable for the judgment against R. S. Kirk?

No judgment was rendered against him in the lower court—nor did he appeal.

The Supreme Court rendered judgment against him because he was a partner of the firm, having reversed the judgment against R. S. Kirk & Co.

R. S. Kirk's liability as a partner, and so decided, is not a judgment, nor a confirmation of a judgment, against a partnership, of which he was a partner, with others. To conclude otherwise we should have to disregard the judgment rendered on appeal, the words of the bond and the evident intention of the parties to the same expressed therein. The obligation of the sureties was to satisfy whatever judgment might be rendered against R. S. Kirk & Co. on appeal.

No judgment has been or can be rendered against R. S. Kirk & Co. on the appeal, and there can be no judgment to satisfy.

Suretyship is restrained within the limits expressed and intended by the contract. See C. C. 3008.

The judgment of the lower court is avoided and reversed, and judgment is now rendered in favor of the sureties, R. W. Adams & Co.

Plaintiffs are to pay costs of both courts.

HOWELL, J., recused.

ILSLEY and JONES, J. J., absent.

SUCCESSION OF EDWARD PARKER.

A silence of five years in the settlement of partnership accounts will bar any claim for balances.

APPEAL from the Second District Court of New Orleans, *Morgan, J.*
HOWELL, J. This is a suit for the settlement of an alleged partnership in a steamboat, and a question of fact is only presented.

Plaintiff alleges an express agreement that he was to become the owner of one-eighth of said steamer, which the deceased Parker was then having built, and that in payment thereof he was to superintend the fitting out of the boat and to run on her as pilot, at the highest wages, until the value of his services less his necessary expenses should amount to one-eighth of the cost of the boat, which is stated at \$25,000. He alleges that said services were duly and faithfully rendered by him, without drawing any wages, until the said Parker, who was the captain, instructed the clerk thereafter to pay them, as his interest in the boat was entirely paid for, and that at the end of the second business season of the boat, he left because of some difficulty with Parker; and he prays for an account and judgment for \$12,500 as his portion of the earnings of the boat for over six years, up to the date of her destruction by fire.

A general denial was pleaded and a judgment rendered in the lower court in favor of defendant, from which plaintiff appealed.

A careful examination of the evidence, in the record, does not enable us to disagree with the District Judge.

Three witnesses testify that Parker said Hughes was to have an interest in the boat. One of them, *Dowty*, the clerk, and plaintiff's principal witness, says further, that Captain Parker said to him that plaintiff was to go as pilot, until the boat was paid for, and draw only his necessary expenses until that time; that about the latter part of the second season, Parker told Hughes the boat was paid for, and he had better draw some money and buy a negro to work on the boat for wages. Whatever may be the effect of this evidence, which, in our opinion, does not establish the alleged part ownership, it is rebutted by the acknowledgement of plaintiff to the witness, *Dowty*, "that he and Captain Parker had fallen out, and that Captain Parker had settled with him and paid him off;" and by his long silence, not urging any claim until January, 1860, some five years after the date of his leaving the boat, as alleged in his petition.

Judgment is affirmed, with costs.

JONES, J., absent.

HYDE & GOODRICH v. NEW YORK & NEW ORLEANS STEAMSHIP CO.

Where articles of greater value are packed in the same box with ordinary freight it does not change their character, and will not relieve the common carrier from liability for their loss, if those more valuable goods are not lost.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
A. Robert for plaintiff.

J. Ad. Rozier for defendant and appellant.—In considering the subject of notice, it becomes proper to consider the effect of misrepresentation, fraud and concealment of the owner of the goods in respect to the nature, and amount, and value of them. It is plainly the duty of every person sending goods by a common carrier, in the absence of notice, not to practice such imposition and deception upon him, as will add to his risk and lessen his requisite care and diligence, and any false statement, or unfair concealment, or material suppression of facts, whereby the carrier is misled, will exempt him from the responsibility of a common carrier. In the absence of notice, says Mr. J. Nelson, if any means are used to conceal the nature of the article, and thereby the owner avoids paying a reasonable compensation for the risk, the unfairness, and its consequence to the carrier, upon the principle of common justice, will exempt him from responsibility, for such a result is alike due to the carrier, who has received no reward for the risk, and to the party who has been the cause of it, by means of disingenuousness and unfair dealing. *Angell on Carriers*, p. 266, § 258; *Orange County Bank v. Brown*, 9 Wend. R. 116.

It is well established that the owner of the goods, or the person delivering them, must take care not to do or say anything which shall tend to mislead the carrier in respect to the requisite care to be taken of them. If the owner adopts a disguise for his box, which is calculated to prevent the carrier from taking the particular care of it which the real nature and value of its contents demand, he cannot recover in case of loss, even in the case of gross negligence, beyond the value of the box itself; as, for example, by labeling a box or a trunk as containing articles of a different nature and inferior value from what are its real contents. *Angell on Carriers*, p. 269, § 261. *Relf v. Rapp*, 3 Watts & S. Penn, R. 21.

HOWELL, J. The facts of this case do not bring it within the application of the rule invoked by defendants and recognized in the case of *Baldwin v. Collins*, 9 R. 468.

Their own witness, *Sellick*, says pistols are considered ordinary freight; and the fact that articles of greater value were packed in the same box with them does not change their character and will not relieve the common carrier from liability for their loss, if, as in this case, those more valuable goods are not lost.

We think there is no error in the judgment of the lower court, and it is therefore affirmed, with costs.

FIELD & SHACKLEFORD v. JAMES CAMPBELL.

The verdict of a jury will not be disturbed except for good cause, and damages will be allowed on an appeal from a judgment thereon.

APPEAL from the Second District Court of New Orleans, *Duvigneaud, J. Whitaker, Fellows and Mills* for defendant and appellant.

Field & Shackelford in propria personæ.—The petition alleges that, on the 7th May, 1860, the defendant, being then under arrest for killing one Peter Roach, employed plaintiffs to defend him on said charge; that they informed him they would charge him \$1,000, to which he made no objection; that they immediately undertook his case, prepared affidavits, and obtained his discharge from the "lock-up" on bail, and continued to act as his counsel until 18th May, 1860, when defendant, without any sufficient cause, discharged them; that they were always ready and willing to defend him in any court; that *his case was a bad one*, and that \$1,000 was but a reasonable fee in the case.

The answer contains a general denial, and a prayer for a trial by jury.

On the trial, plaintiffs obtained a verdict and judgment for \$1,000, the whole amount claimed, and the District Judge before whom the case was tried, refused to disturb the verdict or grant a new trial, and the defendant has taken this appeal.

More than half dozen witnesses prove that defendant employed plaintiffs to defend him; that plaintiffs prepared affidavits and presented them to the Recorder of the First District, and obtained defendant's release from the lock-up of said District on bail, before the case was examined by the Recorder; that this was done at the urgent request of Campbell and his friends. In his answer to the *subpoena duces tecum*, the defendant admits that he received a letter from A. P. Field, inclosing a promissory note for \$1,000, for him, defendant, to sign, in which Field informed him that said amount was as low a fee as he could properly charge him. It is true, said letter had no date, but the *subpoena duces tecum* describes it as a note handed to him while in the "lock-up." And *Mushet* says he saw the note for \$1,000 in Campbell's possession, while in the lock-up, and *Richardson* says he saw said note in Campbell's hands, in the lock-up, and that he, Campbell, was reading it, on the day that he was admitted to bail by the Recorder.

After he was released by the Recorder, and had been out on bail some days, he was again arrested by the Chief of Police, and Colonel Field again appeared before the Recorder as counsel for defendant, and again obtained his discharge.

Some time after this, viz: on 18th May, 1860, defendant's case was laid before the grand jury, and Field was in the First District Court-room, off and on, all that day, attending to and watching the progress of the investigation; and, when the jury returned a true bill, late in the afternoon, went, in company with defendant, to the parish prison, and up to the time they parted on that evening, as appears by the testimony of *Schaineznyder*,

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the deputy sheriff, who took defendant to the prison, Campbell gave no signs of complaint against Field ; thus showing that defendant continued to avail himself of plaintiff's services as counsel, long after he received the note informing him of the amount of the fee charged, without objecting thereto, and establishing beyond controversy the special agreement laid in the petition.

But, in addition thereto, *Thomas J. Durant*, who was associate counsel in the case, in his testimony (p. 20), says he regarded the fee a reasonable one.

T. J. Semmes, Isaac E. Morse, E. W. Moise, all of whom had been Attorneys General for the State, and *B. S. Tappan*, who had been District Attorney, all testify as to the general ability and skill with which Field managed criminal cases, and none of them had ever known him to mismanage a defence.

The defendant himself offered in evidence his note, discharging plaintiffs from further attention to his case, but offered no proof of mismanagement or neglect ; and, in fact, his only ground of complaint (see testimony of *Mullen*, p. 16,) was that plaintiffs had failed to do that which they were not bound as counsel to do, and which neither they nor defendant had any legal right to do or demand, viz: to summon witnesses to appear before the coroner's jury, and be notified of the time at which the grand jury would take up his case.

These are in law *ex parte* proceedings, and the accused has no right to be heard there, or, indeed, in contemplation of law, even *to know* that such investigations are being held; and no such complaint was heard until after defendant and his friends, upon consultation in the parish prison, had concluded that it was to the interest of defendant to employ another legal gentleman, whom they supposed to have more influence than Field with the then Judge of the First District Court, before whom he was to be tried.

HYMAN, C. J. Plaintiffs sued defendant for \$1,000, attorneys' fees. The case was tried by jury, and a verdict given in favor of plaintiffs. The District Court rendered judgment in conformity to the verdict. Defendant, failing to obtain a new trial, appealed. The claim of the plaintiffs is fully proven. Judgment affirmed, with fifty dollars damages.

JONES, J., absent.

LEEDS & Co. v. H. FASSMAN.

Where the parties to a contract, by mutual consent, enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol.
 A party must be put *in mora* in order to be made liable for a suit in damages on a contract. And this applies to reconventional as well as to direct actions.

APPPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Edw. Rawle for plaintiffs. *Durant & Hornor* for defendant and appellant.

ILSLEY, J. A contract was made by *Leeds & Co.* and *Henry Fassman* for the construction and putting up of a steam engine at the Orleans Steam Cotton Press.

The plaintiffs sue for a balance due them on said contract, amounting, according to their petition, to \$1,050 76.

The defendant pleads : 1. A general denial. 2. He admits the written agreement alleged by plaintiffs, and says that the plaintiffs bound themselves therein to deliver and erect the machinery on or before the 15th of August 1858; that in making the contract defendant *H. Fassman*, as the plaintiffs well knew, acted merely on behalf of his firm, *Fassman, Bryant & Co.* Defendant alleges default in plaintiffs in not delivering the machinery at the proper time, and when delivered, it was so defective and so broke down, and not brought into proper condition for work until 1st January, 1859, which caused them damages to the amount of \$1,047 45. They pray judgment in reconvention.

It is conceded that the machinery was not delivered according to the written contract, but it is proved by the testimony of a witness, that defendant had admitted in conversation that the time expressed in the contract had been expunged, and plaintiffs allowed to make the delivery at their own will, without regard to any limit. This parol evidence was objected to on ground :

1. That the effect was to vary a written contract.
2. That plaintiffs' petition declared on a written contract and contained no allegation of any change therein, and that parol proof cannot be admitted to prove the modification or cancellation of a written contract.

On the first objection, we think it covered by the case of *Bouligny v. Urquhart*, 4 La. 30, where it is held in effect, that where the parties to a written contract, by mutual consent, enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol. It was in that case, as in this, a mere modification of the original contract; and the rule therein adopted might be more aptly applied in this case than in that cited, because in this, the change did not in any manner effect the essence of the contract.

There was nothing in the contract that required it to be reduced to writing, and as it might have been established originally by parol, it is not easily perceived, as the Supreme Court say, in *Gardner v. Batville*, 5 Al. 597, why it could not be "modified" or avoided in the same manner.

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The second objection is, that there was no allegation of any change in the original contract; and defendant relies on the cases of *Bouligny v. Urguhart*, 4 La. 29, and *Jamison v. Ludlow*, 3 A. 493, to sustain him therein.

We think the case of *Mathias v. LeBret*, 10 Rob. 94, by no means militates against these decisions. It is true that in both these cases the new contract was alleged in the petition, and therefore no question on that point could possibly arise, whilst, in the *Mathias v. LeBret* case, the objection now raised was directly met.

That was, like this, a suit on a contract, and parol evidence was objected to, to prove that the contract had been changed and altered, because there was no such allegation in the petition; and thereupon the Court says: "On referring to the petition, we have found an allegation that 'if any alteration was made in the contract, or delay occasioned, it was by the order and consent of the defendant. This allegation, says the Court, was undoubtedly sufficient to authorize the admission of the testimony, but if any doubt exists as to its admissibility under such an allegation, it seems to us that it was admissible at least to rebut the defendant's allegation that the work was not complete within the time specified in the contract.'"

The parol testimony adduced was certainly admissible.

The plaintiffs in this case, from the evidence in the record, are undoubtedly entitled to the amount claimed; nor can we find any evidence to entitle the defendants to their reconventional demand.

As to any damages, if any had been sustained by them, by the delay in the delivering and erecting the machinery, there is nothing in the record to show that the plaintiffs were ever put *in mora*, which is an essential pre-requisite to a suit for damages; whenever the breach of a contract is a passive one, and the non-performance of the contract. La. Code 1927, 1905 et seq.; *Kirkman v. Barton*, 14 La. Rep. 81; and this applies to reconventional as well as to direct actions. *Morton v. Rills*, 5 L. 414. The defendant has not called our attention to any evidence adduced by him to show that "when the work was delivered it was so defective and so broken down, and that it was not brought into proper condition for work until 1st of January, 1859, and thereby caused them damages; nor can we find any to that effect in the record, but it is proved by plaintiffs that the work was well done, the materials good, and that nothing was defective. It is also shown that \$8,000 was paid without a word of objection after the work was completed, and the reason assigned for the non-payment of the balance was solely the want of funds.

There is no error in the judgment rendered in this case.

It is therefore ordered, adjudged and decreed, that the judgment of the Court below be affirmed, with costs of appeal.

HOWELL, J., recused himself in this case.

DANIEL MARCY, et al. v. J. L. WARNER & Co.

Where freight is received without objection or protest, on the part of defendant, it is too late to dispute the legality of plaintiffs' claim.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.* *Buchanan & Gilmore* for plaintiffs. *Benjamin, Bradford & Finney* for defendants.

JONES, J. The plaintiffs sue the defendants for a freight bill, on the shipment of a cargo of ice, from Boston to New Orleans, by the vessel *Orazimbo*. The defendants, besides a general denial, plead, by way of reconvention, that they suffered damage on said shipment to the extent of six thousand dollars, on account of the negligence of the captain and crew, on this voyage, from the point of departure to the place of destination, which damage is specially charged to have arisen, on the part of said captain and crew, in carelessly permitting salt water to mingle with said cargo of ice.

The plaintiffs have fully established their right of action, and the amount thereof, by the custom of New Orleans, where said ice was delivered by contract.

We propose to examine the reconventional demand set up by the defendants against the plaintiffs.

The cargo of ice having been shipped in good order, and received without objection or protest on the part of defendants, it is too late to dispute the legality of plaintiffs' claim. The evidence on behalf of plaintiffs, and the conduct of defendants, cast the *onus probandi* on the defendants, as plaintiffs in reconventional demand, to show to a legal certainty, by proof, that they have sustained the whole or part of the damage, as alleged in their demand.

We think the evidence, in this respect, is too vague and uncertain, to base any judgment in favor of these defendants against the plaintiffs.

Besides, we are satisfied, from the evidence in the record, that if any loss to the cargo of ice was sustained, outside of that incident to its transportation, it occurred in consequence of stress of weather, for which the law would not hold plaintiffs responsible.

We are, therefore, of the opinion that the judgment must be affirmed, with costs.

LABAUVE, J., absent.

ELIAS HALL v. PETER McLAUREN.

Persons holding a slave under a precarious title in Alabama can not obtain a remedy in our Courts.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Durant & Hornor for defendants. *T. J. & A. G. Semmes* for plaintiff and appellant.

LABAUVE, J. The plaintiff, a resident of the State of Alabama, states that he is the true and lawful owner of a negro woman slave, named Adeline, aged about fifteen years, and worth \$1,200. That he has been in lawful possession of said slave for the past ten years or more, in the States of Alabama and Georgia. That in the month of April, he placed said slave in the possession of his agent, Walton Morton, in the city of New Orleans, and that on the 3d day of July, 1859, one Peter McLauren, a resident of the State of Georgia, then in the city of New Orleans, went to the dwelling house of his said agent and forcibly seized and carried away said slave.

He prays that said Peter McLauren be cited to appear and answer, and that after due proceedings, petitioner be decreed to be the owner of said slave.

The defendant pleaded a general denial, and that the said slave was his property and was purchased by him from Morris & Woods, in the year 1849, together with several others, etc. He prays to be dismissed, with costs.

The court below, after hearing the testimony, evidence and arguments of counsel, thought that the plaintiff had failed to make out his case, and gave judgment for the defendant.

The plaintiff has introduced a mass of testimony to establish his title to the slave, by a peaceable possession of six years under the laws of the State of Alabama; but we are of the opinion that he has failed to make out his case. It is in evidence that, under the laws of the State of Alabama, ownership in a slave may be acquired by a peaceable possession of six years without notice of adverse claim. The testimony shows that the plaintiff's possession was precarious and held under and for the defendant; in the neighborhood, it was acknowledged that the defendant was the owner of the slave.

It is therefore adjudged and decreed that the judgment appealed from be affirmed, with costs.

JONES, J., absent.

P. W. HOFFMAN *v.* L. B. DUNHAM, et al.

The judgment of the Court *à quo* will not be disturbed, unless good reasons are assigned therefor.

APPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Whitaker, Fellows & Mills* for plaintiff. *Hart & Martin* for defendant and appellant.

HOWELL, J. Plaintiff claims \$5,000 damages, for being forcibly ejected from the steamer *Fanny Bullitt*, and denounced as a thief, cut-throat, etc.

Judgment was rendered in the lower Court in his favor, for \$2,000. Defendant Dunham, the captain, has appealed.

We are not favored with a brief or argument by the appellant; and, after examining the record, we do not discover such error as to authorize us to disturb the judgment.

The evidence establishes the material allegations in the petition, the good character of the plaintiff, and his afflicted condition.

The judgment is affirmed, with costs.

HYMAN, C. J., absent.

WM. H. KENION *v.* PETER HAWES.

An appellant who does not file within ten days after the record is brought up a written paper specifying an error of law appearing on the face of the record, unless he rely upon a statement of facts, an exception to the judge's opinion, or special verdict, will have his appeal rejected.

APPEAL from the Fourth District Court of New Orleans, *Price, J. J. Q. Bradford* for plaintiff. *John McKee* for defendant and appellant.

LABAUVE, J. Plaintiff and appellee have filed a motion to dismiss the appeal on divers grounds; one is, that:—

“The transcript of appeal contains no complete statement of the proceedings had, and documents offered in evidence on trial, as will appear by the certificate of the clerk, and as apparent on the face of the papers.”

The clerk says:

“I hereby certify that the above and foregoing fifty-five pages do contain a transcript of all the proceedings had, as well as of all the documents filed and the testimony adduced on the trial of the cause, wherein Wm. H. Kenion is plaintiff and Peter Hawes is defendant, and instituted in this court, and known on the records thereof under No. 12,990, with the exception of record of writ No. 6,807, of the docket of the Sixth District Court, entitled *John C. Hammond v. E. H. Angomar & Co.*, offered by defendant, also the supplemental contract offered in evidence by defendant.”

The appellant has not appeared in this court, nor has he filed herein a written paper, stating specially any error of law appearing on the face of the record.

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The motion must prevail. C. P. Arts. 896, 897.

Appeal dismissed at appellant's cost.

JONES, J. absent.

HENRY KEAN v. WM. L. BRANDON et al.

Where evidence was received without objection by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J. Durant & Hornor* for plaintiff and appellant. *Benjamin, Bradford & Finney* for defendants.

JONES, J. This case was originally before this court and remanded. See 12 An. p. 20. After this case was sent back to the lower court for further proceedings under the mandate of this court, auditors were appointed to render an account between the contending parties.

They found a balance of five thousand seven hundred and sixty-nine dollars and seven cents in favor of defendants, as on reconventional demand.

From a judgment rendered against the plaintiff in favor of defendants, predicated on the report of the auditors, the plaintiff has taken this appeal.

We have examined the record of the first appeal, and the record of this appeal, and find that the defendants have plead no reconventional demand, but the present record before us discloses the fact that defendants offered evidence before the auditors, and introduced proof to like effect on the trial of the cause, to support a reconventional demand without objections on behalf of plaintiff, and also moved to homologate the report of the auditors. We therefore feel authorized under our well settled jurisprudence to decide this case on the evidence adduced, without objection, in the same way had the same been received under a formal pleading of a reconventional demand. 4 An. 193, *Eastran v. Harris*; 5 An. 184, *Ames v. The People's Telegraph*; 9 An. 255, *Gayrre v. Tennard*.

The report of the auditors having been received in evidence without objection, and the oral evidence of the auditors on the trial of the case fully supporting their report, we feel justified in confirming the original judgment.

Therefore, for these reasons, it is ordered, adjudged and decreed, that the judgment of the lower Court be affirmed, with costs.

HOWELL, J., recused.

ISLEY, J., absent.

SUCCESSION OF F. A. LUMSDEN.—OPPOSITION OF MRS. MARY ANN THOMPSON.

The laws establishing the order of successions, and those which treat of their administration, are essentially different.

An inheritance remains without an heir and in abeyance until the rightful heir accepts or rejects it, according to the Article 1028, C. C., giving him time for deliberation. Such an heir has but a residuary interest. C. C. 1066.

APPEAL from the Second District Court of New Orleans, *Morgan, J. C. Roselius and A. Le'hrop for opponent and appellant.*—On the 8th September, 1860, Colonel F. A. Lumsden, his wife, and their only child, Frank Spedden Lumsden, all “perished by the happening of the same event,” to wit: the sinking of the steamer *Lady Elgin*, on Lake Michigan.

On the 10th October, 1860, the succession of said Frank Spedden Lumsden was duly opened in the Second District Court of New Orleans, and Robert Spedden appointed administrator. On the same day, A. M. Holbrook filed his petition in said court, praying for the opening of the succession of Colonel Francis A. Lumsden, and to be appointed administrator of the same. One of the heirs of Frank Spedden Lumsden, to wit: Mary Ann Thompson, his grandmother, filed her opposition to the application of said Holbrook for the opening of another succession for the purpose of administering twice on the same property, and to the appointment of Holbrook as administrator. The court dismissed the said petition of opposition, rendered judgment decreeing the opening of the succession of Colonel F. A. Lumsden, and appointing Holbrook administrator, from which judgment said opponent has appealed.

We say the judgment decreeing the opening of the succession of F. A. Lumsden was illegal, for the following reasons:

That the judgment previously rendered, ordering the opening of the succession of Frank S. Lumsden, being a judicial recognition that he was the last survivor, according to the rule laid down in Articles 930, 931, and 933 of the Civil Code (the deceased family all being between the ages of fifteen and sixty), left no succession of the father upon which to administer, the same being merged in that of the son at the instant of the father's death. C. C. 934; 15 La. 527, and 12 Rob. 258.

Article 1115 C. C. reads as follows:

“The partner or partners of a commercial house, having accounts to render to the heirs of their deceased partner, can in no case be appointed curators to the vacant succession or that of the absent heir of the deceased. It must be given to a third person,” etc.

Holbrook is therefore bound by his own admissions in the record, and the judgment of the court decreeing the opening of the succession of Frank Spedden Lumsden, and thereby estopped from claiming the administration of the succession of Colonel F. A. Lumsden. *Hennen's Digest*, p. 515, Nos. 2, 40 and 42.

Robert Mott for Holbrook.—The death of the Lumsdens must be considered as simultaneous; consequently, by legal interpretation, the parties all

being between the ages of fifteen and sixty, the mother and father died first. C. C. 933.

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There was a point of time in which there was a succession of F. A. Lumsden, and that succession was a vacant one,—did the death of young Lumsden fill the vacancy and close the succession, so that it ceased as a succession to exist, and all the rights and attributes of that succession were merged in the succession of young Lumsden? We think not. If the succession was ascertained, then the rights of third parties vested, and can be exercised.

The elder Lumsden was a partner in the firm of Lumsden, Kendall & Co., printers and publishers of the Picayune newspaper; Holbrook, who applied for administration of the estate of F. A. Lumsden, was one of the members of that firm, as such, he was entitled to the curatorship in preference to the heir—for Article 1114, C. C., says that "the surviving partner of the deceased in preference to the heir present or represented, unless the partnership be a commercial one," and commercial partnerships are declared by Article 2796, C. C., to be, .

"1. For the purchase of any personal property and the sale thereof, either in the same state or changed by manufacture ;

2. For buying and selling any personal property whatever as factors or brokers ;

3. For conveying personal property for hire, in ships or other vessels."

The printing and publishing a newspaper does not come under either classification. *Heath v. Howell*, 15 La. 138. *Brown v. Hughes*, 2 An. 623. *McAuley v. Barnes*, 15 La. 427. *Parker v. Brashaer*, 16 La. 69.

The partnership being proved, the reason exists why the surviving partner should administer, and why he should have charge of the estate of his deceased partner and settle and hand it over to the heir after the payment of the debts ; and in the eye of the law that heir is the succession of the younger Lumsden, what right that the law guaranteed to Holbrook, could the death of young Lumsden destroy or set aside.

And what right has the grandmother of young Lumsden to oppose? She does not claim a right to administer, nor is she a creditor. The expense of settling the estates may as well be had in the succession of the elder as the younger Lumsden. C. C. 1051. R. S. p. 339, § 15. *Hennens Digest* (new edition), p. 1470, Nos. 15, 16 and 20.

LSLEY, J. The facts on which the questions in this case arise are these :

On the 8th September, 1860, Colonel F. A. Lumsden, his wife, and their only child, Frank Spedden Lumsden, all perished by the happening of the same event, the sinking of the steamer *Lady Elgin* on Lake Michigan.

On the 15th of the same month, Mrs. Mary Ann Thompson, the grandmother of Frank S. Lumsden, applied to the Second District Court of New Orleans for letters of administration in his succession. Her application was opposed by Robert Spedden, the child's grandfather, and by A. M. Holbrook, the present appellee. The grandfather's opposition was sustained, and letters of administration were issued to him.

On the same day that Robert Spedden was appointed administrator, as

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before stated, to wit: on the 10th October, 1860, the said A. M. Holbrook alleging himself to be a surviving partner of F. A. Lumsden, applied for letters of administration on his succession, which, notwithstanding the opposition of Mrs. Mary Ann Thompson, for reasons stated by her (which will be hereafter adverted to), were granted to him on the 20th of the same month.

The opposition of Mrs. Mary Ann Thompson to the application of A. M. Holbrook, to administer on F. A. Lumsden's estates, is based on the following grounds:

1. That it being conceded that Frank S. Lumsden survived his parents, and are their sole legal heir, that the property and effects left by said parties legally constitute but one succession, which succession is that of Frank S. Lumsden, already opened and in due course of administration in the Second District Court.

2. That, as heir of Frank S. Lumsden, she opposes the application of A. M. Holbrook to open the succession and administer on the same property, under the name of Francis A. Lumsden, as it will cause delay, incur additional costs, to the detriment of opponent, and is an illegal proceeding.

3. That, from the action taken by Holbrook, the allegations contained in his petition of opposition, and admissions in the succession of Frank S. Lumsden, he is precluded and estopped from opening a succession of Francis A. Lumsden upon the property belonging to the succession of Frank S. Lumsden, or administering upon the same.

Mrs. Mary Ann Thompson's counsel urge in this court, besides the grounds stated in the opposition, another ground, the disability of Holbrook to administer F. A. Lumsden's estate, because Holbrook and the deceased, at the time of his demise, were commercial partners; but, as this was not a ground of opposition in the Court below, it will not be noticed here.

In support of the first ground of opposition, the appellant's counsel urges that the judgment ordering the opening of the succession of Frank S. Lumsden, left no succession of his father, whose sole heir he was, upon which to administer, the same being merged in that of the son at the instant of his father's death, and that the subsequent opening of the succession of the father presents a legal impossibility, as it is to decree that the same property can belong to two separate and distinct successions, and be administered upon by the administrators of the respective successions at the same time; and he suggests, in illustration of his position, several reasons, which he deems conclusive, why the second succession was improperly opened. These reasons would be as cogent if applied to the opening of Frank S. Lumsden's succession, had that event taken place after the opening of his father's succession, which might have occurred even before the death of Frank S. Lumsden; and it therefore has no practical bearing on the principal question involved, which is, whether the succession of F. A. Lumsden became, by his son's death, so blended with and merged into the succession of the latter, as to lose its identity for administrative purposes. As this is the theory contended for by the appellant, let us test its accuracy; and we know of no mode we can proceed more readily to do so, than by suggesting cases, which, if the thesis of

the opponent be founded on principle universal in its application, *would show its utter impracticability, if not impossibility.*

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Let us suppose, for the sake of argument, that Colonel Lumsden, instead of only one son and legal heir, had left several children and the issue of other pre-deceased children, all these descendants would certainly have been his legal heirs, and had they all perished by the same or a similar calamity, which overwhelmed Lumsden's family, all the different successions of the several heirs might have been, as was that of F. S. Lumsden, opened before that of the father, would the succession of Colonel Lumsden have become so merged in the successions of his numerous heirs? and its affairs so divided and split up, so as to adapt them to the fractional interest that each heir might have in the succession of Colonel Lumsden; and that, too, before it was known what each of these successions might claim, and before the realization of the distributive share of each?

Again, had the succession of Frank S. Lumsden consisted of mingled property derived from various sources, which might be actually the case, as we have nothing in the record to show in what it does consist, say from other successions, besides that of his father, could the several successions be so merged for administrative purposes with his own succession, as to draw into the vortex of these mixed administrations all the creditors and legatees of each of these several inherited successions?

As we apprehend this question, the fallacy of the opponent's theory, consists in the confounding two subjects which are entirely distinct in their nature—i. e. the law establishing the order of successions with that which treats of their administration. Each has its appropriate place in the text of the law.

There is, however, another question which needs solution, and that is, what immediate right the minor, Frank S. Lumsden, acquired by his father's death. Art. 940 C. C. holds his right in abeyance until he decides whether he accepts or rejects a succession, and that is the doctrine of the Roman law. Domat, referring to that law, says: "Since it often falls out that the inheritance remains for some time without a master, because he who ought to succeed is absent, or that he deliberates whether he shall accept or renounce the inheritance, (the faculty accorded to beneficiary heirs by Act. 1026, C. C.,) and that during this interval it may happen that some right may accrue to the succession, or that it may be engaged in new charges or other affairs. The said inheritance is therefore considered as holding the place of the master, and as representing the deceased to whom it belongs. Droit Civil Lib. 1. T. N. 1, §§ 1, 11, 14.

The interest of Frank S. Lumsden was merely a residuary one, and this could be only determined after his father's succession had been duly administered. See Art. 1066 C. C.; *Arthur P. Cochran*, tutor, 12 Rob. 41; *Audat, Curatrix v. Gilly*, 12 Rob., 323.

In what does the position of Mrs. Thompson differ from that of Frank S. Lumsden, so far as the necessity of a separate administration of F. A. Lumsden's succession is involved?

As to the judicial admission of Holbrook, relied on by the opponent to estop him from claiming the administration of Col. Lumsden's succession, we cannot see how it can possibly effect the exercise of that right.

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There is no error in the judgment overruling Mrs. Thompson's opposition, and it is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, and that the appellant pay the costs of appeal.

JONES, J., absent.

J. B. FEATHERSTON v. GRAHAM & BUCKINGHAM.

The acquiescence of the principal in the conduct of the agent, is a clear ratification of his action.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
A. G. Semmes for plaintiff. *Bonford, Singleton & Clack* for defendants and appellants.

HOWELL, J. This is an action to recover a balance alleged to be due on advances made for account of defendants.

Plaintiff, in St. Louis, procured shipments of produce to defendants in New Orleans, to be sold on commission by the latter, for account of the shippers. As the various shipments were made during several months, plaintiff made advances thereon, and informed defendants of the amounts so advanced. No objections were made by the latter, until plaintiff demanded the sum sued for, when defendants contended that plaintiff had exceeded his instructions in not allowing a sufficient margin to protect against loss.

This defense is not maintained, and even if plaintiff had exceeded his authority in this respect, the conduct of defendants was a clear ratification of the action of their agent. They should have objected when informed that the advances were severally made.

Judgment affirmed, with costs.

S. FRIEDLANDER v. JOHN M. BELL et al.

If a sheriff sell anything, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter must indemnify the former.

Prescription does not begin to run until the time of eviction.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Roselius & Philips for plaintiff and appellant. *C. A. Taylor and Benjamin, Bradford & Finney* for defendants.

HOWELL, J. This is an action against a sheriff and his sureties for

damages, which plaintiff alleges he has sustained in consequence of being evicted from certain property bought by him at sheriff's sale. The plaintiff was evicted on the ground that the sheriff's sale was a nullity, because the property had not been seized at all. Judgment was rendered in the lower Court in favor of plaintiff for a part only of his claim, and he has appealed.

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The District Judge held the defendants responsible for the money actually paid into the hands of the sheriff, but sustained the prescription of two years, under the 10th section of the Act of 1855, p. 366, to that portion of the sum which was for costs and charges, and released them from liability for all sums paid to the creditors of the defendant in execution, attorneys' fees, taxes and insurance premiums, &c., paid by plaintiff after the sale.

The only question to be decided is, what is the extent of the liability of the sheriff?

In the case of *Fleming v. Lockart*, 10 M. 308, it was said: "If a sheriff sell anything, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter ought to indemnify the former." In 9 L. 559, *Morris v. Abat*, the same principle is thus enunciated: "The marshal certainly warrants the correctness and legality of his own acts, and if by his illegal acts he has caused damage, he is bound to make reparation."

In the case of *Lambeth v. The Mayor et als.*, 6 L. 731, this liability was limited to the direct and immediate injury resulting from such negligence or illegal acts, and the question arises, what is the direct and real injury which the plaintiff in this case has sustained by the negligence and omission of the sheriff, in consequence of which the sale was avoided to the prejudice of the former? According to the standard recognized in the case last quoted, it does not extend beyond the amount paid on a contract of sale, which the officer or his legal representative was bound to defend.

The property, in this instance, was adjudicated to plaintiff on the 26th of July, 1856, for the price of \$375, payable at 12 months' credit. In settlement of which, as shown by the sheriff's deed of sale, the plaintiff assumed, 1. The payment of the mortgage in favor of the Citizens's Bank of Louisiana, with contribution note, for \$1,455. 2. He retained the amount of the mortgage in favor of the minor children of the defendant in execution, for \$910 62. 3. He retained the amount of the judgment and interest in favor of the plaintiffs in execution, amounting to \$618 56. 4. He paid to the sheriff the costs and charges of both sales, amounting to \$342 55; and, 5. Furnished his bond in the sum of \$348 27, at twelve months, for the balance of the said price of adjudication.

The sums which appear, from the proof in the record, to have been paid by plaintiff on account of this void contract of sale, are the following, to wit:

FRIEDLANDER	The costs and charges of the case of <i>Hemmingway, Friedlander & Co. v.</i>	
v.	<i>Rika Hershheim</i> , No. 10,067 in 4th District Court.....	
BELL.		\$ 342 55
	The 12 months bond in said case	336 68
	Bill of costs credited on said bond.....	28 70
	April 29th, 1857. Contribution to Citizens' Bank, due 1st May 1857.....	75 00
	June 3d, 1857. Instalment on stock, note due 1st June, 1857, to Citizens' Bank.....	\$ 46 00
	Interest at 6½ per cent. for 1 year....	86 70
		132 70
	June 1st, 1858. Instalment on stock, note due 1st June, 1858, to Citizens' Bank.....	\$ 46 00
	Interest at 6½ per cent. for 1 year....	83 72
		129 72
	Total.....	\$1,045 35

The taxes and insurance premiums paid by plaintiff after his purchase are not chargeable to the sheriff, not having been contemplated in the contract of sale. The law made it the duty of the sheriff to pay all the taxes due on the property at the date of sale, and the presumption is, that he did so, and that they (if any) were included in the 'charges' paid by plaintiff.

The plea of prescription of two years, sustained by the lower Court, does not, we think, apply to this case, as plaintiff had no right of action until he was evicted, and the item of costs was, as to time, as much a part of the price paid under the contract of sale as any other portion of the whole. This suit was commenced within a year after the eviction. The plea must be dismissed.

The defendant, John M. Bell, deceased, is represented by his widow and executrix.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that the plaintiff and appellant do recover from Mrs. Frances B. Bell, in her capacity as widow and tutrix, and James Robb, Alfred Penn, Emile LaSere, Logan McKnight, Bernard Avegno, Samuel Smith, William A. Gasquet, Samuel Jamison, W. G. Mullen, P. Deverges, W. S. Pickett, Peter Marcy, R. J. Ward, S. W. Oakey, G. S. Hawkins, Patrick Irwin, John Armstrong, J. L. Urbray, John L. Macaulay, and John Pemberton, sureties of the late John M. Bell, sheriff of the parish of Orleans, *in solido*, the sum of one thousand and forty-five dollars and thirty-five cents, with legal interest from judicial demand, and costs of both courts.

JONES, J., absent.

GRAHAM & BOYLE v. G. LEDDA.

Where an abandonment for a total loss is notified, by the master, to the underwriters, and accepted by their agent, it is binding, and passes the property to the insurers, if otherwise valid. The necessity for a sale of a vessel cannot be denied, when the peril, in the opinion of those capable of forming a judgment, make a loss probable, though the vessel may, a short time afterwards, get afloat.

A bill of lading can have no effect until its delivery to the consignee.

The ratification of an abandonment to the agent of the underwriters dates back to the time of the act or contract ratified.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
J. Ad. Rozier for plaintiffs. *Cyprien Dufour* for defendant and appellant.

LSLEY, J. The object of this suit, instituted in the Sixth District Court of New Orleans, is to recover from the defendant, two flatboats of staves, which the plaintiffs claim as their property.

The defense is, that the property in controversy belongs to the defendant, having received it in due course of trade, from certain parties, at Memphis, who bought it at a sale made by the agent of the assurers.

The plaintiffs were the consignees of the staves, etc., which had been shipped to them from Cairo, by N. W. Graham & Co., on the 8th June, 1859, but, owing to the stranding of the boats on a sand-bar, near Memphis, they, with their cargoes, were abandoned by the master, to the underwriters, the Peoria Marine and Fire Insurance Co., whose agent subsequently sold them, at private sale, to Stephenson, or Stephenson & Park, from whom the defendant derived his title.

The abandonment took place under the following circumstances: Before the departure of the flatboats from Cairo, the insurance company which had insured the boats and cargoes, placed in the hands of the pilot, or master, instructions addressed to him and signed by the proper officers of the company, to the effect that, should any disaster insured against, happen to the property, "you will use all due diligence to save the boats and cargoes, and ship, if practicable, to any of the undersigned agents of this company (among which figures the name of Wm. E. Milton), and should you want assistance or advice, apply to the nearest agent, as soon as the accident happens.

The master made a solemn protest, before a notary public at Memphis, in which, among other things, it was stated, that every exertion had been made to get the boats afloat, even with the aid of a towboat, but in vain. He then proceeded, according to the instructions of the underwriters, to call upon their agent, *W. E. Milton*, and, having stated all the facts of the case, expressed the intention to abandon the insured property, as in the case of a total loss. In his testimony, this agent says: "I immediately sent *W. A. Radford*, surveyor for the underwriters, at Memphis, to examine the condition of said flatboats, who reported their condition to be bad; that the river was rapidly falling, and would leave them on dry land, and advised the sale of said staves at once; and witness accordingly sold the same to *J. H. Stephenson*, for \$17 50 per thousand, which was the

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best price he could get for them, and he considered it a good price, under the circumstances."

The abandonment was therefore notified to, and accepted by, the agent of the underwriters, as he took the control of the insured property into his hands. It was competent for the master to act as he did. Abbot on Shipping, 167, *et seq.* And if it was otherwise a valid abandonment, it passed the property to the underwriters. See 2 Phillips on Insurance, No. 1490; and the master then became the agent of the underwriters, if they were not already represented by their general agent, W. E. Milton. See the case of *Hooker v. Whitney*, 19 La. 267; *Phillips v. St. Louis Insurance Company*, 11 Al. 459; 3 Kent's Commentaries, p. 331—2.

As there is nothing in the record to show the extent of the powers of the agent of the insurance company, beyond the broad statement in his testimony, that he acted in the premises only upon the general authority as their agent, and, as such, did therein what he considered to the best interest of the said insurance company, it is difficult to determine whether he exceeded his powers in accepting the abandonment, and disposing of the assured property; but we may very reasonably presume that these acts were within his competency, because, in a letter addressed by the secretary of the company, he does not intimate an objection to the want of power in the agent to act, but gives other reasons which he deems sufficient to invalidate the abandonment and the sale.

In any contingency, a notice of the abandonment to the agent, completed and made their operation final; and if it was otherwise legally made, the plaintiffs would have, in this instance, no cause of action against the defendant, whether the sale made by the agent was a valid one or not.

That the master acted in good faith, exercised his best discretion for the benefit of all concerned, there can no be question; and whether the abandonment was made upon the compulsion of a necessity, must be now ascertained. We have seen what was the report of the surveyor, and that is entitled to great weight (see Parsons on Maritime Law, 645—6); the more especially, as this report was made at the special instance of the agent of the insurance company, and by their own surveyor. He considered the boats and cargoes in a perilous condition, and advised an immediate sale of them. Another witness more than corroborates the testimony of the surveyor, and, so far, the conduct of the master in abandoning must be presumed to have been a wise and prudent step, and fully justified by the circumstances. See *Thompson v. Mississippi Insurance*, 2 La. R. 239, and numerous authorities therein cited.

But, to take from this testimony and show that the impending peril was not so imminent as to justify an abandonment and sale of the property, it is contended that the flatboats were eventually floated off, and found their way to the terminus *aquo*. This is true; but the testimony of a witness proves that extraordinary means were used to discharge the boats and put them afloat.

In the case of the *New Eng'and Company v. The Sarah Ann*, p. 217, 13 Curtis, the Supreme Court of the United States says (speaking of the sale by the captain of the insured vessel): "Nor can the necessity for a sale be denied, when the peril, in the opinions of those capable of form-

ing a judgment, makes a loss probable, though the vessel may a short time afterwards get afloat."

There is no evidence in the record to show when the bills of lading for the staves were actually delivered to the consignees; and it is competent for the shipper and owner, even after a shipment has been made, and a bill of lading, making the goods deliverable to a consignee, has been signed, to attach conditions to the assignment, or to revoke it at any time before the bill of lading or the goods are actually delivered to the consignees. See *Abbott on Shipping*, p. 328; *Mitchell v. Ede, Perry & Davidson*, 513, 11 Act. & Ell. 888. And in *Hepburn v. Lee & Hardy et al.* 14 La. Rep., it was held "that the bill of lading could have no effect until its delivery to the consignee."

We must assume, then, that the shippers, N. W. Graham & Co., on the 25th June, 1859, the date of the letter, written and signed by them, as it is shown, and duly transmitted to the agent of the Peoria Insurance Office, at Memphis, controlled the flatboats Hayden and Ulen, so far as to enable them to make any arrangement with that company, in relation to the abandonment of the assured property; and it is clear that, by that letter, with a knowledge of all the facts, which they therein state they acquired from C. Boren, the master and pilot of the boats, they approve of the abandonment which the master had made, and ratify it in the most unqualified terms.

This letter, addressed to "Mr. Milton, insurance agent, Memphis," is in the following words:

"June 25th, 1859. We are informed by Captain Boren that you took possession of flatboats Hayden and Ulen, and sold their cargoes for account of Peoria F. and M. Insurance Company.

We learned this some days ago, since when we have been expecting to hear from you or this insurance company on the subject, with a statement of account and a remittance, either to us direct or the consignees, Graham & Boyle, New Orleans, but are, thus far, without that pleasure. Do us the favor to oblige us fully at once."

It would be difficult to conceive how a ratification of the abandonment, and, indeed, of all the concomitant circumstances, could be more distinctly made, and the legal effect of this ratification is too plain to be questioned. See the cases of *Perotiu v. Cucullu*, 6 La. Rep. 587; 1 vol. Hen. (new) Dig. 838, § 11.

And the ratification dates back to the time of the act or contract ratified. 8 vol. Toullier, 514. Story on Agency, § 239. *Bloodworth v. Jacobs*, 2 Al. 224. *Dunbar v. Bullard*, 2 A. 816.

Whether the sale to the persons, who transferred the property in dispute to the defendant, by the agent of the insurance company, was regular, customary and legal, is exclusively a matter between these purchasers, or the defendant and the underwriters. All that is necessary now, is to determine whether the rights of the shippers, or even of the consignees, if they had acquired any, which we cannot discover that they had, were divested by the abandonment made by the master.

We think the plaintiffs have failed to show title at any time to the property in dispute, and that, in any contingency, the right of the owner, whoever he was, when the abandonment was made, passed absolutely to

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the underwriters, who claim nothing in this suit. The judgment must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the Court below be reversed and annulled, and that judgment be rendered in favor of defendant, with costs of both courts.

HOWELL, J., recused.

MRS. ELIZA W. HUNTINGTON *v.* JAMES D. BROWN.

The exclusion of warranty in a sale cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects, not apparent in the things sold, when he knows of their existence; and the vendee is not precluded, by such exclusion, from showing that at, and previous to the time and date, the vendor was aware of the existence of redhibitory defects, and fraudulently concealed them.

Although it be agreed that the seller is not subject to any warranty, he is, however, accountable for whatever results from his personal acts, and any contrary stipulation is void. His silence will not avail him, when he does not disclose infirmities.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*

E. W. Huntington for plaintiff.—1. The right of action arose prior to the adoption of the present Constitution. It was a legal right under the Constitution and laws of the State then existing; and no subsequent change in the organic or statutory law could modify or destroy it. "No State shall pass any *ex post facto* law, or law impairing the obligation of contracts." Constitution of the United States, Art. 1, § 10.

2. The Constitution of 1864, however, is inapplicable to this case. The object of the suit is not to assert the right of property in man, but to recover a sum of money received by defendant under fraudulent sale of a slave.

3. The evidence is conclusive that the slave died of an incurable disease. See Testimony of Dr. Wederstrandt and others.

4. It is proved that, for one month previous to the sale, the slave had been in the Touro Infirmary, under treatment for the malady which destroyed his life, and that he was taken out of the infirmary by defendant on the day following the day of sale.

5. No proof was adduced to show that plaintiff was aware of the existence of the disease when he purchased the slave.

6. The express exclusion of warranty is not, as a general rule, equivalent to a declaration of unsoundness. Vendor is bound to disclose vices and maladies within his knowledge, not apparent on simple inspection. *Hives v. Lacaze*, 3 R. 357. *Galpin v. Jessup*, 3 R. 90. *Civil Code*, 2526. *Delansen v. Robichaux*, 17 L. 101. *Turner & Renshaw v. Wheaton*, 18 L. 37. *Robert v. St. Romes*, 2 A. 135. *Franck v. Hough*, 14 A. 659.

7. What constitutes fraud? C. C. Art. 1841, Nos. 5, 12, 2526.

8. As to reservation of action for expenses, etc. 3 R. 90; 3 R. 359; 13 L. 39; 2 A. 135; 14 A. 659.

Durant & Horner for defendant and appellant.—I. This action is *contra bonos mores*, and prohibited by the letter and the spirit of the Constitution of this State. Constitution Art. 1 and 2.

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II. Even conceding, for argument, that it is proved (which it is not) that the disease of the slave was incurable, there are three sufficient reasons why the sale should not be rescinded :

1. Because there is no proof that the defendant knows this fact. *Belknap v. Kerediz*, 15 A. 203.

*2. Because plaintiff was fully informed of the disease and duration of the sale.

3. Because the plaintiff bought without warranty, and under the information that the slave was a runaway, as well as sickly ; and *she took the risk of both vices*.

III. Plaintiff did not wait for Brown to return before purchasing. She did not pay *half the price of a sound negro*. She knew what she was buying, and reposed confidently on her own judgment and experience. She must, therefore, sustain the loss. Digest 50, 17, 203 ; 3 Savigney, § 115. *S. Romes v. Pore*, 10 Mar. 215. *Thompson v. Milburn*, 1 N. S. 472. *Nelson v. Linard*, 16 La. 340. *Galpin v. Jessup*, 3 Rob. 91. *Philpps v. Berger*, 15 A. 111.

ILSLEY, J. This suit was instituted in the Sixth District Court, to rescind the sale of a slave and recover his price, with costs incurred, in consequence of a redhibitory defect, with which the said slave was alleged to have been affected previously to and at the time of the sale, and that, too, to the knowledge of the vendor, the defendant, who fraudulently concealed it from the vendee, the plaintiff.

She avers that, had she known the existence of the defect, she would not have bought the slave.

The general issue was pleaded and a special denial of the fraud alleged.

It is a textual provision of the law, and not an open question in the jurisprudence of this State, that "The exclusion of warranty in an act of sale cannot avail the vendor when it is fraudulently made, as he is bound to disclose redhibitory vices and defects not apparent in the things sold, when he knows of their existence, and the vendee is not precluded by such exclusion from showing that, at and previous to the time of sale, the vendor was aware of the existence of redhibitory defects and fraudulently concealed them. See C. C. 2449 and 2526. 2480 C. C. *Hannibal v. Faulk*, 14 659. *Ogden v. Michel and husband*, 37 ; 4 R. 156.

In the act of sale, from Brown to Mrs. Huntington, is the following clause: "Said slave is hereby guaranteed by said vendor in title only, and not against the vices, maladies or defects, prescribed by law, of which refusal to guarantee said slave against said vices, maladies and defects, said purchaser hereby takes cognizance and renounces all recourse therefor hereafter."

In the absence of fraudulent concealment by Brown, of the redhibitory malady in the slave, at the time of the sale, this clause would have protected him; but he cannot, if the fraud be shown, escape from the provision of the 2480 Article of the Civil Code, which reads thus: "Although it be agreed that the seller is not subject to any warranty, he is,

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however, accountable for whatever results from his personal act, and any contrary stipulation is void." The reticence by the vendor of a redhibitory malady in the slave, which good faith binds him to disclose to his vendee, would be as fraudulent in the eye of the law as a false statement in regard to his physical condition.

The case of *Faulk v. Hough*, 14 La. Rep. 660, enunciates the true principle by which this and all kindred cases must be governed.

That the slave, at and previous to the time of sale, had a serious if not an incurable disease, is incontestably proved by the physicians who testified on the trial of the case; and that the vendor knew of its existence, and that the condition of the slave would soon render him almost worthless, is not less manifest from the testimony of Dr. Bensadon, who says he was taken by Brown, to be sold, out of the Touro Infirmary, wherein he had been from August, 1859, till the 6th or 8th of February, under medical treatment for a progressive disease. See 2496 C. C.

The fact that Dr. Bensadon offered only \$300 for the slave, for hospital purposes, shows that defendant was aware that he was physically unsound; and, indeed, it is to be presumed that, as the slave was under medical treatment in an infirmary during six months, the defendant must have known what was the matter with him.

There is no error in the judgment of the lower Court, and it is therefore ordered, adjudged and decreed that it be affirmed, with costs.

HOWELL, J., *reused*.

J. B. OLIVIER v. WILLIAM RANDOLPH.

The verdict of a jury, and consequent judgment thereupon, will not be disturbed, except for solid reasons.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J. Durant & Hornor* for defendant and appellant.

Laverne for plaintiff.—It is a well settled principle that the occupancy of property, without the consent of the owner, entitles the latter to the estimated rents of the property, as damages for the trespass or illegal detention. 11 Rob. 280, *Fisk v. Moores*.

Defendant has urged as one of his grounds of defense that he has the right to use the plaintiff's batture, which is dedicated by law for public use.

The defendant, singularly enough, confounds his own private use with public use. The dedication is to the public, and not to Mr. Randolph. The court is referred to the case of *Heirs of Duvergé v. Salter and Marcy*, where the proprietors of a dry dock, in the same locality, attempted to enforce the same pretensions as the defendant has raised in this case. The court held: "Our laws secure the public use of the banks of navigable rivers, and within the incorporated limits of towns; the municipal government is authorized to regulate that use; but their regulations must

be in furtherance of the public use to which the banks are subjected, and cannot be taken advantage of for the purpose of forever enjoying the property of the riparian proprietor, which is not necessary for public use. The public have the right to use the banks of navigable rivers, but this right does not authorize the permanent location of a dry dock in front of a land owned by another person. 6 A. 450. Art. 489, C. C.

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HYMAN, C. J. Plaintiff sued defendant for the lease of a lot of ground in Algiers, fronting on the Mississippi River. He alleged that, on the 3d November, 1860, defendant owed him \$524 98 for the lease of this lot; that, by agreement, the lease was to terminate on 1st January, 1859; that the rent was \$41 66 a month, he reserving to himself and family the right of crossing the river in the ferry boat, of which defendant was proprietor, as long as the lease lasted; and that by defendant's continued use of the lot from the 1st January, 1859, the date of the termination of the lease under the contract, defendant owed him the sum claimed.

He prayed for judgment not only for the sum alleged to be due, but also judgment of \$50 a month for every succeeding month defendant retained the lot.

Defendant, in answer, denied all the allegations of plaintiff; alleged that he was proprietor of a ferry from the Third District of New Orleans to the foot of Olivier street, on the opposite side of the river (the street below and adjoining plaintiff's lot); that the Police Jury, on the right bank of the river, had assigned that part of the street fronting on the river as a ferry landing, and that the ferry landing was public property. He asked judgment against the plaintiff for \$450 on his claim in reconvention, for ferriage of plaintiff and his family from the 1st January, 1859.

The Judge of the lower Court, on 21st May, 1860, rendered judgment in conformity with the verdict of the jury, decreeing defendant to pay plaintiff five hundred dollars per annum, *as rent*, from 1st January, 1859, to the date of the judgment, with legal interest from that date; also decreeing the rejection of the reconventional demand of defendant.

Defendant has appealed.

The real questions in this case (however much defendant may have attempted to change them by averments) are, whether there was a contract of lease, and whether, after its termination, it was prolonged by defendant's continuing in possession.

After a careful examination of the evidence, we see no reason to reverse the judgment.

The judgment is affirmed, with costs.

JONES, J., absent.

CHARLES A. MILTENBERGER v. SARAH A. HILL, et als.

At a sale *a la folle enchere* when the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to his vendor for the deficiency, and for expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudicated, the first purchaser has no claim for the excess. The vendor can prosecute the vendee for a specific compliance with the terms of the sale, as for damages, by an ordinary action, or proceed to a re-sale at the risk of the vendee. This last remedy is a severe one, and must come clearly within the provisions of the law.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
George S. Lacey for plaintiff and appellant.—On the 16th day of September, 1857, the Sixth District Court of New Orleans, in the succession of Elkaniah Reed, ordered a sale of certain property, falling to the widow and to the heir of deceased, situated in the Fourth District of the city of New Orleans.

On the 19th of October, 1857, this property was exposed at public sale and adjudicated to plaintiff for \$8,000, \$1,500 of which was payable in cash, and the balance on a credit until the first day of June, 1864, with eight per cent. interest thereon, payable annually.

Plaintiff paid on account of his purchase \$650: \$600 on the 20th of October, 1857, and \$50 on the 29th of the same month.

Sarah A. Hill, as surviving partner of the community which had existed between herself and her deceased husband, Elkaniah Reed, and as dative tutrix of Charles Henry Reed, son of deceased, on the 13th of April, 1859, obtained a pretended order directing a re-sale of the property adjudicated, as above set forth, to plaintiff, and under and by virtue of this unauthorized proceeding, the property aforesaid, on the 11th of June, 1859, was sold to William J. Maynard for the sum of \$8,550, \$1,500 payable in cash, and the balance on the first day of June, 1865, with eight per cent. interest on said balance from the 19th day of October, 1857, until paid. Record, pp. 18 and 19.

December 9, 1859, Maynard transferred to plaintiff, Miltenberger. Record, p. 29.

The present action was commenced for the recovery of the \$650, with eight per cent. interest from October 20th, 1857, to date of payment.

In their answer, defendants admit the receipt of \$650, as alleged in the petition. They, however, substantially aver that the plaintiff improperly and illegally refused to comply with the terms of the sale made to him on the 19th of October, 1857; that a sale *a la folle enchere* was therefore made; and that plaintiff is bound for the loss and expenses occurring subsequent to the first sale, which exceeds the sum advanced by him to the extent of \$98 93.

Wherefore, they pray that defendants recover judgment against plaintiffs for the sum of \$98 93, with interest at eight per cent. from June 19th, 1959, with costs and general relief.

Your Honors will at once perceive, that defendants in their pleadings admit the receipt of the amounts in the petition alleged to have been

paid, while in their argument they will not, as an abstract question, deny their liability to return the sums advanced by plaintiffs, with interest from the dates of payment. MILTENBERGER
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The defense is really an *offset* to the demand for \$650; an alleged legal liability on the part of plaintiff to defray the expenses accruing subsequent to the first sale; the second having been made, as is averred, for account and at the risk of plaintiff, Miltenberger.

The characteristics and consequences of this second sale, will, therefore, form the leading subject of our argument.

We contend:

I. That the sale to Maynard was not, in fact, a sale *à la folle enchère*.

II. That it cannot, *in law*, be regarded as having that character.

III. That if such sale, in fact and at law, was for account and at the risk of Miltenberger, that plaintiff is not liable for the expenses of said sale, and the same cannot be deducted from the claim for \$650 with interest.

IV. That if liable to deduction, the amount of such expenses must be fixed at a figure even less than that adopted by the District Judge.

First. The sale to Maynard, June 11, 1859, was not *in fact* a sale *à la folle enchère*.

Upon referring to the petition, your Honors will perceive that the plaintiff has averred that the title given to him at the time of his purchase, was not good and valid. In the judgment of the District Court, the invalidity of such title is expressly referred to and decided in the following language of his Honor, Judge Howell: "In this case he is liable only for the expenses legally incurred, since defendants *were in a condition to give plaintiff a good title to the property.*" Language, which, when taken by itself, and more clearly when viewed through the surrounding facts of the case, show exclusively that plaintiffs were not, at the time of the adjudication, in a condition to bestow upon Miltenberger a valid title; or, in other words, that the title conveyed was not good and sufficient.

Moreover, on the pretended failure of Miltenberger to comply with the terms of the adjudication, the property was not re-offered, as provided for in Art. 2589, Civil Code. New proceedings were had, a second family meeting was called, and the entire groundwork of the second adjudication, *which took place two years after the first*, evidently had for its object, not simply a sale *à la folle enchère*, but a second adjudication, made on account of defects of title, which existed at the time of the sale to plaintiff.

With these facts patent upon the record, how can your Honors conclude, as a mere question of fact, that the adjudication to Maynard was one *à la folle enchère*? Will not plaintiff's averment of want of title, the recognition of such invalidity by the court *a quo*, and the course pursued by defendants, in calling a second family meeting and offering the property for re-sale, two years after the first adjudication, instead of putting it up at once for sale, under Art. 2589 of Civil Code, justify this honorable court in concluding that a good title was not given to Miltenberger at the time of the adjudication to him; and that, on account of such defect of title, and not alone with the view of selling for account and at the risk of Miltenberger, the sale to Maynard was had?

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Second. The second sale cannot *in law* be considered as one *à la folle enchère*. Should the court, as a mere question of fact, regard the adjudication to Maynard as a sale *à la folle enchère*, still, when looked at through the law, that character ought not to be given to it by your Honors.

The second sale cannot be treated as one made on account and at the risk of Miltenberger, or, in other words, as a sale *à la folle enchère*, because :

1. A good title was not given to plaintiff at the time of the adjudication to him. *Porter v. Liddle*, 7 M. R. 23; *Ponchartrain Company v. Durel*, 6 La. R. 484; *Lernes v. Laubert*, 8 Rob. 224; *French v. Meux*, 9 Rob. 414.

2. The second sale does not appear to have been made under a judgment of court regularly rendered and signed. *Gallia v. Garcia, Sheriff, et al.*, 2 Rob. 319.

3. The terms of the second sale were not identical with those of the first: Terms of first sale, \$1,500 cash, and balance on credit until 1864.

Terms of second sale, \$1,500 cash, and balance on credit until 1865. *Guillotte v. Jennings*, 4 An. 242.

4. Plaintiffs waived the right to a sale *à la folle enchère*.

After the adjudication to Miltenberger, he paid on account of his purchase \$650, upon the cash instalment, and this amount was received by defendants without protestation or reservation of right to a sale *à la folle enchère*. This amounts to a waiver of right to sell on account and at the risk of plaintiff. Miltenberger, after paying the \$650, was undoubtedly bound otherwise to comply with the terms of the sale, and, on failure so to do, he was liable to action for the enforcement of a specific performance of the contract or its dissolution; but the harsh remedy, *à la folle enchère*, was gone the moment a partial payment was made without objection, protestation or reservation on part of plaintiff.

"The remedy by a sale *à la folle enchère* is a severe one and must be confined to cases coming clearly within the provisions of the law." *Guillotte v. Jennings*, 4 An. 242.

5. Plaintiff was not properly put in default in order to render the second sale good *à la folle enchère*. *Stewart v. Paulding*, 6 La. 155; *Hodge v. Moore*, 3 Rob. 400; *Petit v. Laville*, 5 Rob. 117.

Third. Admitting, for the sake of argument, that the adjudication to Maynard was in fact and at law a sale *à la folle enchère*, the defendants even then have not the legal right to subject Miltenberger to the payment of the expenses incurred subsequent to the first adjudication.

If at the second crying the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to the vendor for the deficiency, and for all the expenses incurred subsequent to the first sale. C. C. 2589.

The liability of the first purchaser, by this article of the Code, is made conditional, and entirely depends upon the fact of the property being adjudicated, at the second sale, for a smaller price than that which had been offered by the person to whom the first adjudication was made. If the second bid is smaller than that offered at the first sale, the first purchaser must pay all the expenses incurred subsequent to the adjudication to him, but not otherwise. Such is the express provision of Art.

2589, and this honorable court has said, in *Guillotte v. Jennings*, already quoted, that the remedy, *à la folle enchère*, is a severe one, and must be confined to cases coming clearly within the provisions of law.

Applying these rules to the case at bar, how can plaintiff be made liable, directly or indirectly, for the expenses incurred subsequent to the first sale?

Fourth. The amount of expenses, if chargeable to plaintiff, must be fixed at figures less even than those adopted by the Court *a quo* in the judgment appealed from. *Vide* charges set forth in defendant's account annexed to their answer, on pages 10 and 11 of transcript of appeal.

1. Interest.—So far as interest is concerned, the second sale was made upon the same terms as the first; and defendants having realized, in that respect, from Maynard, all that they were entitled to receive from Miltenberger, can have no legal reclamation upon the latter for interest. If the terms of the second adjudication did not provide for the payment of the interest, defendants are at fault and are entitled to no relief on that account. Moreover, the District Judge has rejected defendant's demand for interest, and they have neither appealed from the judgment of the Court *a quo*, nor asked for an amendment of that judgment.

2. City and State taxes.—The District Judge says: "Plaintiff caused the estate to pay taxes for the year 1858, which should be paid by him, a portion of the taxes claimed by defendants having accrued while they or the estate were in default as to title."

If the estate was in default, at the time of adjudication to plaintiff, in giving him a valid title, how can he be condemned to pay any part of the taxes? The subsequent curing of a title, acknowledged to have been defective originally, can have no such legal effect.

3. Clerk's costs.—There is but one item in the clerk's bill of costs properly chargeable as expenses incurred subsequently to the first sale. (Record, pp. 47 and 48.) We have reference to the item of \$2, for order of sale. The other items of the clerk's bill, although necessary to cure a defect of title, were unnecessary to a sale *à la folle enchère*, which presupposes no defect of title at the time of the first sale. The Judge *a quo* reduced the charge for clerk's costs to \$2; and in this judgment defendants and appellees have virtually acquiesced.

4. Sheriff's costs.—Costs of sheriff, incidental to resale, \$1 50, not disputed.

5. Auctioneer's bill.—This item, \$84 25, seems to have grown out entirely of the second sale, and is therefore admitted. It was allowed by the Court *a quo*.

6. Attorney's fees—\$342 and expenses of family meetings, etc.

If the first adjudication to Miltenberger conveyed a good and sufficient title, and he refused to comply with the terms of his purchase, the remedy was simple, requiring no professional skill and labor, and the intervention of no family meeting. Services of counsel were rendered, it is true, but these services were occasioned by the fact that the estate was not in a condition to give a good title at the time of plaintiff's purchase, and professional skill and labor were required to remedy that defect. The Court *a quo* erred in allowing \$50 on account of the services of counsel, particu-

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larly as no evidence in the record authorized the estimate adopted by the judge.

Whitaker, Fellows & Mills for defendants.—There are decisions, for instance, 1 L. R. 401, and 7 L. 506, which apply to a case where the property brings less at the second sale. The first purchaser pays the “deficiency in the price, and all the expenses incurred subsequent to the first sale.” The same article of the Code provides, “if a higher price is offered for the thing than that for which it was first adjudged, the first purchaser has no claim for the excess.”

Now, by the first clause of Article 2589, C. C., the purchaser at the first sale is to make completely whole the vendor; this includes all the expenses incurred. If the first purchaser has *no claim* for the excess at the second sale, how can it be claimed that he is to benefit by using the excess towards the payment of the expenses incurred, and for which he is absolutely responsible? There is no decision on the subject in our books, and the letter of the Code is so clear that it would seem one was hardly necessary. Suppose the excess of price is \$100, and the expenses \$200, who is responsible for the difference? Or again, suppose the price bid at the second sale is the same as at the first, who pays the expenses? Undoubtedly, the first purchaser; and yet the reasoning of the plaintiff would lead to exactly the contrary conclusion, in both of the supposed cases.

The only reasonable interpretation of Article 2589, C. C., appears to be that the purchaser at the first sale is, in all events, to pay all the expenses incurred subsequent to that sale; he is also to make up the deficiency of the price, if the property sells for less; but, if it sells for more, “he has no claim for the excess.”

The next question is in regard to the items claimed in reconvention.

The plaintiff has been in possession of the property for years. He should, most undoubtedly, reimburse the taxes paid by defendants, which accrued after a clear title was ready for him. This was 19th April, 1858. The court allowed \$90, being the taxes for one year. The time was one year and two months: say from April, 1858, to June, 1859. The additional proportion, one-eighth, would be \$15.

The attorney’s fees, for perfecting the title and procuring a re-sale, were admitted to be reasonable at \$342. It was proved that, for perfecting the title, \$250 was a large fee. (Labatt’s testimony.) This would leave for the re-sale \$92; the judgment allows but \$50.

The notary’s fees were paid, and shown to be reasonable at \$79; the judgment allowed but \$29, rejecting that portion of his bill for holding the family meeting, etc., on the ground that it was not absolutely necessary for the re-sale. Now, this was a re-sale where a minor was interested, and there was a suit for the price, a suit for damages, or a re-sale, as the different means of redress which might be pursued.

And it is submitted that a title by resale would have been of doubtful validity, unless a family meeting had determined for the minor which course was the best to pursue. It was then a necessary expense incurred in behalf of the minor, occasioned by the failure of the plaintiff to comply with his bid, and take title of his property.

LABAUE, J. The plaintiff claims against the defendants the sum of ^{MILTENBERGER} \$650, with interest, on the ground that a short time previous to the 20th October, 1857, said Mrs. Hill did sell to him certain property, in consideration of which he advanced, in part payment to said Mrs. Hill, the sum of \$650; that said defendants were unable to make title of said property to said plaintiff, and that the said property was resold to other parties at the risk of petitioner; that the property, at the re-sale, brought more than at the first sale.

The defendants answered by a general denial; and, for further answer, they say: that on the 19th October, 1857, by virtue of an order of Court in the succession of Reed, the property was exposed at public sale and adjudicated to said Charles A. Miltenberger, for the price of \$8,000, of which \$1,500 were payable cash, and the balance on the 1st June, 1864, with interest at 8 per cent. per annum, payable annually; that after the said purchase, on the 20th October, 1857, the said Miltenberger paid on said price the sum of \$650, but refused to pay any further portion of said cash, nor to give his notes as required by the adjudication; that pursuant to the deliberation of another family meeting and an order of the Judge, the said property was re-sold, at the risk of said Miltenberger, for \$8,500, upon the same terms as before; and they say that the difference between the first and the second sales is \$835 49, which the cash proceeds of the second sale failed to supply.

The second sale took place on the 11th June, 1859, and the property was adjudicated to one Maynard, who transferred his title to the plaintiff on the 9th December, 1859. The plaintiff contends that he was not properly put in default, in order to render the second sale good *à la folle enchère*.

There is no evidence showing that said plaintiff was ever put in default; but he pleads and admits in his petition that the property was resold at his risk, and it is in evidence that he bought, on the 9th December, 1859, from the second purchaser, Maynard, at the sale made *à la folle enchère*; thereby approving and ratifying the said sale *à la folle enchère*, under which he now holds, and admitting that the said second sale was legal, and that he had been put legally in default.

The next question is one purely of law, and that is in regard to the proper application and interpretation of the second paragraph of Article 2589 of the Civil Code, reading thus:

"And if, at the second crying, the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to the vendor, for the deficiency, and for all expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudicated, the first purchaser has no claim for the excess."

There are two clauses in this paragraph, each with a penalty imposed on the first purchaser. By the first clause, the first purchaser is bound to make up the deficiency between the first and the second sales, and to pay all expenses incurred subsequent to the first sale; by the second clause, the purchaser has no claim to the excess above the price of the first adjudication. This excess goes to the vendor, although the purchaser be the legal owner of the thing, which is at the risk of the latter,

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after the adjudication. Civil Code, Arts. 2442, 2443, 2586. The price of the second sale exceeded that offered at the first adjudication, and we have to apply the second clause of the second paragraph of the Art. 2589 of the Civil Code. But it is contended that the first purchaser is liable for all cost even under the said second clause. We think not. We cannot add another penalty to the law; it was for the legislator to do so. The remedy by sale *à la folle enchère* is a severe one, and must be confined to cases coming clearly within the provisions of the law. 4 A. 242. The vendors here could have prosecuted the plaintiff for a specific compliance with the terms of the sale, or for damages, by ordinary action, or proceeded to a re-sale at the risk of the plaintiff. 2 L. 403; 7 L. 508; 14 L. 559. They have selected the last remedy; they must stand by the law governing the case, and which it is our duty to apply strictly, as it is a penal one.

We are of the opinion that plaintiff in this case is not bound for the cost incurred subsequent to the first adjudication.

It is therefore adjudged and decreed that the judgment of the District Court be reversed; that the defendants' demand in reconvention be rejected, and that plaintiff recovers of the defendants *in solido* the sum of six hundred and fifty dollars, with legal interest thereon from the 30th March, 1859, and costs of suit in both courts.

HOWELL, J., who tried this case below, did not participate in this decision.

JEAN LOUIS PELE, Executor, v. THOMAS O. MEAUX.

The failure to declare in the act of mortgage the exact amount of insurance, does not invalidate the act.

The order of the court directing the executory process must be strictly in accordance with the authentic act; items not embraced therein will be stricken out, and the decree sustained for the express conditions of the mortgage.

APPEAL from the Second District Court of New Orleans, *Morgan, J. J. Ad. Rozier* for plaintiffs.

Edward Rawle for defendant and appellant.—This is an executory proceeding, and the defendant appeals. The petitioner states that he is holder of a note for \$3,000, made by defendant, the payment of which is secured by mortgage. After reciting the act and making the usual allegations, he prays that the property mortgaged may be sold, and that out of the proceeds, he shall be paid the sum of \$3,000, and \$3 cost of protest, and \$30 premium of insurance and the interest, and \$150 attorney's fee.

The following order was given: "Let executory process issue in this case, as within prayed for, according to law."

1. The mortgage.—In the act, the debtor mortgages certain property to secure the payment of two notes, one for \$3,000 and one for \$500, and also to reimburse to the mortgagee the lawyer's fee, in the event of the

non-payment of the said notes at maturity; also the reimbursement of all premiums of insurance as shall be paid by the mortgagee, and all charges and expenses. It is also stated that, in the event of said notes not being paid, the mortgaged premises may be seized and sold under executory process without appraisement, the mortgagor waiving and renouncing the benefit of appraisement, and all laws and parts of laws relative to appraisement of movables and immovables, etc.

It is seen that, for the charges and expenses, for the premium of insurance and for the lawyer's fees, there is no sum mentioned.

It is a rule that there cannot be a valid conventional mortgage unless the exact sum for which it is given be declared in the act.

"To render a conventional mortgage valid, it is necessary that the exact sum for which it is given shall be declared in the act." "*Que la somme est certaine et déterminée.*" L. C. 3277.

There must be nothing left for calculation. It must be stated and determined. Such is the rule found in the Louisiana Code and in the Napoleon Code.

La loi a donc été conséquente avec elle-même en exigeant que l'acte contint une énonciation exacte des sommes pour la sureté desquelles l'hypothèque a été consentie. 2 Troplong Priv. and Hyp. No. 545. See also, Duranton, vol. 19, No. 385; Guichard Legislation Hyp. vol. 2, p. 179.

In this case, the debtor grants a mortgage for the reimbursement of all premiums of insurance, for lawyers and for expenses. No sum, no "*certain somme*," is named. *Linton v. Pardon*, 9 Rob. 482.

In the case of *Race & Foster v. Bruen*, 11 An. 34, there was perhaps a deflection from the rule which is found in our Code, in the French Code and in the Commentaries. But, in that case, the question was not presented. The opinion of the court touched only that of usury.

Next to be considered is the renunciation of appraisement, which appears in the act. Appraisement of property, seized in execution, is a proceeding established by law and is intended to protect the debtor. As in the case of usury, this right of protection cannot be given away. *Bank of the United States v. Owens*, 2 Peters 538. In the case of *Serrick v. Walker*, it is said that a stipulation that property shall be sold without appraisement ought not to be enforced. 15 An. 243.

2. The order of court.—It is ordered by the Judge that executory process should issue, as prayed for and according to law.

It is a common fault to give orders of court, referring to the petition for explanation. But we must take it as it is, and see what is prayed for: The petitioner prays that the property be sold to pay claims, the existence of which there is no evidence in the act of mortgage. The executory process is useful, but trenchant, and can only be employed according to law. C. P. 732. All the evidence which can be noticed by the judge must be found in the authentic act. Nothing out of it can be received. *French v. M. & T. Bank*, 4 An. 153. *Commercial Bank v. Poland*, 6 An. 477. *Dakin v. Ganahl*, 13 L. R. 512. *Cumming v. Archinard*, 1 An. 279. In the last cited case it was also said that a defect in the certificate of the clerk was of no importance, because, in proceeding

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by seizure and sale, there could be no other evidence than the copy of the authentic act.

It would seem to be treading on the patience of the court to cite more authority to show what is a simple and established rule of law and of evidence, and upon which the decisions of the Supreme Court have been uniform.

HOWELL, J. This is an appeal from an order of seizure and sale, upon a note secured by mortgage and protested for non-payment.

Appellant, the mortgagor, assigns for error, on the face of the record :

1. The mortgage is not good and valid, according to law, because it purports to secure the payment of the premium of insurance and the reimbursement of lawyers' fees, and there is no exact, certain and determinate amount stated. C. C. 3277.

Because the waiver of appraisalment cannot be legally made by the debtor and mortgagor.

The failure to declare in the act the exact amount of the premium of insurance (which is a mere incident to the contract) does not invalidate the mortgage, the object of which is to secure the payment of the note, the evidence of a debt fixed and certain. The clause relating to insurance confers an additional protection, of which the mortgagee may avail himself, in a legal manner, under the stipulation. The amount of the lawyers' fees is made legally certain in the act.

The question of the evasion of appraisalment need not be inquired into here, as the order is to sell according to law, and it is presumed the sheriff will do his duty. See 2 A. 416.

2. The order of the court is not legal, because the judge directs that the property be sold by executory process, to pay the premium of insurance and the cost of the protest of the note ; and there is no evidence, authentic or of any kind, respecting these claims.

This objection seems to be well founded.

Executory process can issue only upon authentic evidence ; and we find nothing in the record to establish the amount of these two items. 1 A. 279. 6 A. 466. This being an *ex parte* proceeding, the seizing creditor must, at his peril, look to the accuracy of his demand and of the decree.

It is therefore ordered that the decree of seizure and sale be amended, so as to exclude therefrom the items of three dollars, costs of protest, and thirty dollars, amount of premium of insurance ; and that, so amended, said decree be affirmed, with costs of the lower court, the costs of this appeal to be paid by the appellee.

WILLIAM J. TAYLOR v. JOHN M. BACH.

If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each appear to be nearly of the same nature, in such case, he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicile. This intention is proved by an express declaration of it before the judges of the parishes from which, and to which, he shall intend to remove. If this declaration is not made, this intention shall depend on circumstances.

A PPEAL from the Third Judicial District Court of Jefferson, *Burthe, J. T. Gilmore* for defendant and appellant.

A. G. Semmes for plaintiff.—The defendant offered in evidence his declaration of change of domicile from the parish of Jefferson to the parish of St. Helena.

If this was a *judicial* declaration of the change of domicile, it could not avail the defendant under the evidence in this case; because the declaration must be combined with or followed by an act of residence in the parish of St. Helena. C. C. 43. Now, there is not a scintilla of proof that defendant *ever resided* in that parish. Even where the proof shows that a person resides alternately in different parishes, the declaration only governs "where the residence appears to be nearly the same. (*Judson v. Lathrop*, 1 An. 79); otherwise, he must be cited in that parish where he appears to have his principal establishment or his habitual residence. C. P. 166; C. C. 42.

But this is not a *judicial* declaration. On the 1st of June, 1855, defendant writes a note to the clerk of the court for the parish of St. Helena, declaring his change of domicile; p. 9. In January, 1857, he has a *certified copy* of this declaration recorded by the clerk of the court for the parish of Jefferson; p. 8.

The laws require an "express declaration to be made before *both* of the judges of the parishes *from and to which* the person intends to remove." 12 La. 195; 8 La. 315.

The defendant also offered as evidence the record in a suit in the Fifth District Court of New Orleans, and two deeds executed by himself, wherein it is stated he was domiciled in the parish of St. Helena. These being mere declarations on the part of the defendant, were overruled by the court, because, I presume, they were *res inter alios acta*, and therefore not evidence. 4 N. S. 52. I am not satisfied that the ruling of the court in this particular was correct. Admitting the court was wrong, the case should not be sent back for a new trial where the ends of justice have been attained (1 R. 192; 3 A. 163; 9 La. 350); and where the same judgment must of necessity be rendered. Giving the defendant the full benefit of these *ex parte* declarations, they could not alter or affect the judgment; for, "where a party's *declarations* in relation to his domicile are inconsistent with his *acts*, they go for nothing." 10 An. 94.

"Where evidence improperly excluded is in the record, the case will not be remanded." 1 Hen. Dig. (new ed.) p. 99 (37); 13 An. 448; 14 An. 61-64; 5 An. 647.

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JONES, J. This suit turns upon a plea of domicil, made on the part of John M. Bach, defendant.

The record discloses the following facts : That the defendant had his domicil at the same time in the parishes of Jefferson and St. Helena. *R. T. Taylor*, on behalf of defendant, says that defendant owns a good deal of property in the parish of St. Helena, and that, for three or four years, he has claimed his domicil in the parish of St. Helena.

But, on cross-examination, the same witness testifies that Mr. Bach resides in the parish of Jefferson; that he is constantly backward and forward, but most of the time in Jefferson; that his residence during the winter is in Jefferson, and that his family is in Jefferson.

P. C. Lecorgne, witness for plaintiff, states he has known Mr. Bach for twenty years; that Bach now resides in Jefferson, and has resided there ever since witness knew him, with the exception of some time when he lived on Washington street, in New Orleans; that defendant, during these twenty years, has lived more in Jefferson parish than any other, and that Mr. Bach's family has always lived most of the time in Jefferson.

In addition to his evidence, the defendant introduced a declaration of his change of domicil from the parish of Jefferson to the parish of St. Helena; and further sought to introduce his declarations in the record of a suit, and two deeds executed by him, wherein it is stated that the defendant was domiciliated in the parish of St. Helena; which declarations and evidence, upon objection being made by plaintiff, were rejected by the court. The evidence so rejected, as well as the other evidence, being before us, we proceed to examine the same:

Now, regarding the evidence rejected by the court as admissible (upon which we pass no opinion), it does not materially strengthen the defendant's plea.

We are satisfied, from the proof, that John M. Bach had, at the same time, two domicils: the one in the parish of Jefferson, and the other in the parish of St. Helena. The law relative to plea of domicil is clear. Article 166 C. P. declares that, if a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each appear to be nearly the same nature, in such a case he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicil.

To the same effect is Article 42 of the C. C. A change of domicil is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there. C. C. Art. 43. This intention is proved by an express declaration of it before the judges of the parishes from which and to which he shall intend to remove. C. C. Art. 44. In case this declaration is not made, the proof of this intention shall depend on circumstances. C. C. 45.

Upon the law and the facts thus presented, we are of the opinion that defendant, John M. Bach, had his principal establishment, at the institution of this suit, in the parish of Jefferson; and, as he resided alternately in the said parishes of Jefferson and St. Helena, and did not declare his

intention, as prescribed by law, to change his domicile from Jefferson to St. Helena parish, he was properly sued in the parish of Jefferson.

Therefore, for these reasons, it is ordered, adjudged and decreed, that the judgment below be affirmed, with costs.

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MARIE U. PAQUETEL, Wife of F. S. GAVOT, v. JOHN GAUCHE.

If a new trial be prayed for on account of the misconduct of the adverse party, or other causes, the party must accompany his motion by an affidavit of the facts he relies upon.

A lessee cannot dispute the title of his lessor.

Where there is no special agreement as to the extent of the lease, it is presumed to be monthly.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
L. Castera for plaintiff. *G. Schmidt* for defendant and appellant.

LSLEY, J. This suit was instituted by the plaintiff to recover the possession of, and to eject from the leased premises the defendant, who, it is alleged, illegally detains them. The defendant plead the general issue, and specially averred that he never was the monthly tenant of the plaintiff, having leased the premises on the 12th January, 1856, from Mr. Pierre Soulé, for the period of two years, from the 15th of October of that year, with the privilege of extending it for five years; of which privilege the defendant has availed himself, and by virtue of which he occupied the premises until the expiration of his aforesaid lease.

Judgment was rendered in favor of the plaintiff, and the defendant, after attempting to obtain a new trial, has appealed.

On the trial of the rule for a new trial, exceptions were filed, on two grounds: 1. Because the evidence upon which said judgment was rendered is insufficient, and does not authorize such judgment; and, 2. Because this suit was instituted by direction of A. Robert, Esq., without any legal and sufficient authority. The defendant offered to prove by A. Pitot, Esq., plaintiff's attorney, that he had been employed to bring this suit, and had brought it by direction of A. Robert, as agent of the plaintiff, from whom plaintiff Pitot had received no instructions to bring said suit.

The defendant also offered to introduce the power of attorney, by virtue of which, Mr. Robert assumed the authority to order the institution of this suit, for the purpose of showing that said Robert was not authorized to institute the same. This testimony was objected to because there was no affidavit showing that the facts defendant wanted to prove had been discovered since the trial, and that it was too late to offer said testimony; and the objection being sustained by the court, a bill of exceptions was taken by the defendant. We think the judge did not err. C. P. 561.

No evidence whatever has been adduced by the defendant to sustain his defense, whilst the plaintiff proves that the defendant has paid rents for the property to her agent; and as he has been in the undisturbed

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possession of the premises as her tenant, he cannot dispute the title thereto. *Tippett v. Ide*, 10 L. 362.

In the absence of any special agreement as to the extent of the lease, it must be presumed to have been a monthly one. C. C. 2655. And due notice having been given him by the lessor to terminate it, in accordance with Article 2656 C. C., by A. Robert, whose testimony on this point it not objected to, the judgment of the lower court must be affirmed.

Wherefore, it is ordered, adjudged and decreed, that the judgment of the lower court be affirmed, and that the appellant pay the costs of appeal.

HYMAN, C. J., absent.

JOHN F. MOHRMAN v. AUGUSTE OHSE.

Malicious slander will be punished by damages, and the verdict of the jury and judgment of the court below sustained.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. W. D. Hennen, M. A. Foute and J. M. Maurian* for defendant and appellant.

Budd & Lambert for plaintiff.—Respectfully call the attention of the court to the following cases: *Kendrick v. Kemp*, 6 N. S. p. 501. *Carlin v. Stewart*, 2 L. R. p. 74. *Juice v. Harvey*, 14 L. R. p. 198. *Miller v. Holstein*, 16 L. R. p. 389. *Feray v. Foote*, 12 An. p. 894. Louisiana Code, 1928, 2294, 2295. 2 Starkie, p. 461, and notes.

LISLEY, J. This is an action for slander, in which the plaintiff claims of the defendant five thousand dollars damages. The general issue was pleaded, and on a verdict of the jury, judgment was rendered in favor of the plaintiff for the sum of one thousand dollars without interest; and after an ineffectual attempt to obtain a new trial, the defendant appealed.

It was proved conclusively in the trial of the case, that the slanderous words and epithets charged were uttered, to and against the plaintiff, at the office of the justice of the peace, wherein the plaintiff was employee as a deputy constable; and this, too, in the presence of his employer and that of other persons.

Had the slanderous words been uttered in an ebullition of passion, the bystanders would have probably attached to them but little weight, but after denouncing the defendant as "a damned thief," a "damned scoundrel," and a damned perjurer:" he concludes, by saying: "I take the whole of you as witness that I say so;" which was very well calculated to produce the impression that he was serious in his denunciation; and if they were untrue, the malicious motive by which he was actuated in thus slandering the plaintiff, is but too evident, the more particularly as it was in the presence of the employer of the plaintiff, and was calculated, from the nature of the epithets used, to destroy his confidence in him.

The judge and jury of the vicinage, who tried the case, have affixed

the damages, notwithstanding the attempt of the defendant to impugn the character of the plaintiff on the trial, and we therefore see no reason to diminish them. See 2294. *Cook v. Tardos*, 6 Al. 779.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, costs of appeal to be paid by appellant.

JONES, J., absent.

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OHNE.

THOMAS G. MACKEY v. WILLIAM E. THOMPSON.

Where plaintiff fails to claim a balance of account he cannot have judgment therefor. The prayer of the petition is all that the court can decide upon.

A PPEAL from the Fourth District Court of New Orleans, *Allen, J.*
J. Ad. Rozier for plaintiff. *Durant & Hornor* for defendant.

HYMAN, C. J. The plaintiff in this case claims judgment against defendant, for services alleged to have been rendered as superintendent on the Marshfield plantation, in the parish of Plaquemines, from the 8th December, 1853, to 8th June, 1857, at the rate of \$3,000 per annum, as per contract alleged in his petition.

Defendant answered by a general denial, and then averred that plaintiff was not to receive any wages; that, on the 22d November, 1856, there was an agreement to pay plaintiff, from that date, \$500 a year. He asked, in reconvention, judgment against plaintiff for \$871 20, balance of account.

The court below rendered judgment in favor of plaintiff for \$4,910 90, with costs.

Defendant has appealed.

In the year 1853, plaintiff, as an insolvent, sued his creditors, was appointed their syndic, and as such, sold by order of court, in December, 1853, to defendant, said plantation, then the residence of plaintiff.

Plaintiff remained with his family on the plantation, and superintended it, until the 8th June, 1857, when he left it, with defendant's consent. At times he was absent. The plantation did not pay expenses.

On the 22d November, 1856, plaintiff wrote a long letter to defendant, in which he made an offer for wages. In this letter he said: "You ask me if I was willing to give up politics, and enter soul and body into business." He proposed therein to erect a rice mill on the plantation; which, he stated, would be very profitable; also proposed to attend to the plantation and mill, and wrote as follows: "As I have got nothing at this time, I should be compelled to have about \$500 per year; but, if the mill

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and plantation pay well, I should look to be paid well also; and, if they do not pay well, I will ask for nothing except the \$500."

This proposition was accepted by defendant.

It is strange that plaintiff should think of reducing his wages from \$3,000 a year to \$500, when he was proposing to increase his labors, greatly to the profit of defendant.

Defendant presented plaintiff an account, showing the transactions between them from 1853 to June, 1857.

Plaintiff took this account, examined it, and returned it with his objections.

In the account, no credit is given to plaintiff for wages, and he made no objection whatever to the same, for that cause.

As plaintiff did not object to defendant's account in regard to omission of credit for wages; and, as he said on the 22d November, 1853, that he got nothing for superintending the plantation, we are of opinion that he is not entitled to any wages up to that date; but, from that date to the 8th of June, 1857, he is entitled to them, at the rate of \$500 per annum, as agreed upon.

Defendant, to sustain his demand in reconvention, produced his account, with the objections of plaintiff thereon.

These objections clearly show a balance due to plaintiff; but, as he has failed to ask judgment for that balance, we cannot grant it.

This suit has been revived in the name of John R. Zehender, administrator of the succession of the deceased plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and it is now ordered, adjudged and decreed, that there be judgment against defendant on his claim in reconvention, and that John R. Zehender, administrator of the succession of Thomas G. Mackey, deceased, have judgment against defendant for the sum of two hundred and seventy-one dollars and twenty cents, with interest thereon at the rate of 5 per cent. per annum, from the 11th day of January, 1858, till paid.

The plaintiff is to pay the costs of this appeal.

JONES, J., absent.

DOMINIQUE VERGES *v.* T. G. NOEL, et al.

Where the counsel of the appellee does not file an answer to the appeal, he can be allowed no damages as for a frivolous appeal. His brief is not considered an answer.

A PPEAL from the Second District Court of the Parish of Jefferson, *Burthe, J. C. Dufour* for plaintiff. *John B. Smith* for defendant and appellant.

HOWELL, J. Appellant was sued as endorser of a note, on which judgment, confirming a default, was rendered against him, upon evidence in the record, consisting of the note, protest and notices of protest.

He has assigned no error nor furnished a brief.

Plaintiff, in his brief, asks for the affirmance of the judgment, with damages for a frivolous appeal.

Having filed no answer to the appeal, as required by Art. 890 C. P., no damages can be awarded. Counsel's brief is not considered an answer. 4 A. 150; 5 A. 146; 8 A. 73.

Judgment affirmed, with costs.

THE STATE *v.* C. F. BEHRENS, Clerk, &c.

The clerk of a court has a right to demand security for the cost of the transcript of appeal. He is not forced to rely upon the uncertain security of an appeal bond.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J.* *P. S. Biron* for the rule. *E. W. Huntington* for defendant.

HYMAN, C. J. A rule was issued to defendant to show cause why a writ of *mandamus* should not issue, directing him to make out a transcript of appeal in the case of *Elijah Bush v. John Barrett*, and deliver the same to the applicant, *Bush*, the alleged appellant in this case.

The clerk showed, for cause, that the applicant had not given security for the cost of the transcript.

The clerk has a right to demand this security before he is required to furnish transcript. See 9th section of an act entitled "an act to regulate and define costs and fees generally," approved March 14th, 1855. See also 6 Rob. Rep. p. 308, *State v. Philips*.

He is not forced to rely on the uncertain security of an appeal bond, as contended for by applicant.

Rule discharged.

JONES, J.. absent.

SUPREME COURT OF LOUISIANA.

MRS. MARIE B. SURGI v. THOMAS SHOOTER, et al.

If any one sells or alienates a piece of land, from one fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it give him a greater quantity of land than is called for in his title, and the surplus exceed the twentieth part of the quantity mentioned in his title.

There can be neither increase or diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary.

A PPEAL from the Third District Court of New Orleans, *Davigneaud, J. J. Magne* for plaintiff. *C. Morel and E. Filleul* for defendants and appellants.

LABAUVE, J. On the 21st January, 1835, John Arrowsmith sold to Charles Cuvellier a certain islet of ground, situated in the suburb Jackson, designated by No. 24 on a plan of T. N. Depeuilly, and comprised between Solomon, Conti (by correction now Bienville), Napoleon streets, and the boundary line of R. Copeland, or assigns's property, and containing eight lots. The dimensions are given to each lot. It is further stated in the act of sale, *and should there be any surplus in said admeasurement, the same is hereby transferred by the seller to the said purchaser.* The evidence shows that the plaintiff is now the legal and true owner of said property under a regular chain of titles. It appears from the evidence that when Arrowsmith sold to Cuvellier, the line separating Arrowsmith's land from that of Copeland, by error of the surveyor Depeuilly, was actually run on said Arrowsmith's land, having a piece apparently belonging to said Copeland. This error having been discovered, Arrowsmith had the land re-surveyed, and he found, as he thought, a parcel of land between that he had so sold and the line of Copeland, and he sold the same to the defendants in the year 1854.

The defendants are in possession and claim under said Arrowsmith by public act of sale passed in January, 1854. The question now is, did or not said Arrowsmith sell the land in dispute to Charles Cuvillier by act of sale of the 21st January, 1835? We are clearly of the opinion that he did, and that when he pretended to sell to the defendants, he had no land there. He had sold to Cuvillier, without reserve, all the land he had between Napoleon, Bienville and Solomon streets, and the boundary line of R. Copeland's or assigns' property. This was clearly a sale *per aversionem*. C. C. Arts. 850 and 2471.

For these reasons, and those given more in detail by the learned Judge of the District Court, we are of the opinion that plaintiff must recover.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed, with costs,

THE STATE v. FREEMAN, et al.

A bill of indictment for manslaughter will not lie unless brought within one year after the offence shall have been made known to the public officer having the power to direct the investigation. And so as regards all criminal offences, except wilful murder, arson, robbery, forgery and counterfeiting.

APPEAL from the District Court of the Parish of Jefferson, *Cazabat, J.*
Hon. B. L. Lynch, Attorney General, for the State. *Henderson & Hills* for appellant.

HYMAN, C. J. The defendant, Freeman, was indicted for murder, convicted of manslaughter, and sentenced.

He has appealed.

Defendant moved to avert judgment on the verdict of the jury, because the bill of indictment was not found within one year after the commission of the crime of which he was convicted.

The bill of indictment was found by the grand jury on 24th April, 1864, and the crime is charged to have been committed in October, 1862. The year had elapsed.

The 10th section of an act entitled "An act relative to criminal proceedings," approved March 14, 1855, provides that no person shall be prosecuted, tried or punished, for any offence, wilful murder, arson, robbery, forgery and counterfeiting excepted, unless the indictment or presentment for the same be found or exhibited within one year after the offence shall have been made known to the public officer having power to direct the investigation.

It is contended on behalf of the State, that the right of prosecution under the statute referred to, only commenced when the offence was made known to the prosecuting officer, and that this right was suspended by the inability of the court to hold its session, by reason of the present war.

No averment of the kind is in the bill of indictment.

The jury should decide on every fact, essential under law, relative to the guilt or innocence of the accused.

The important facts relative to preventing or suspending prescription, were not charged in the bill of indictment, nor submitted to the public jury, nor decided by it, yet, on these facts, after the lapse of a year, in connection with the fact that defendant committed homicide, without malice aforethought, and not excusable or justifiable, depended his guilt of the crime of manslaughter by the laws of Louisiana.

These facts should have been charged in the bill of indictment, and proved to the satisfaction of the jury, to support the verdict for manslaughter. See *State v. Foster*, 7 A. 256.

It is therefore ordered, adjudged and decreed, that the verdict of the jury in the above named case be set aside, and the judgment of the District Court arrested.

SUCCESSION OF JACOB WEIGEL.—OPPOSITION OF HELMA BEATTY.

A judge may affix his signature to an order out of his territorial jurisdiction, where such an order can be granted in chambers, upon an *ex parte* application.

A PPEAL from the Second District Court of New Orleans, *Beauvais, J. Hamilton & Myers* for opponents. *Cutler, Cazabat & Wallace* for the Succession.

HOWELL, J. A motion is made to dismiss the appeal in this case, on the ground "that the order of the inferior court granting the said appeal is null and void on its face, the same being dated New Orleans, instead of the parish of Jefferson, and the judge who signed said order having no sort of judicial authority in said city of New Orleans."

We know of no provision nor principle of law which renders this order a nullity. It is one which can be granted in chambers, upon an *ex parte* application by petition, in the course of proceedings pending in a court, and the affixing of the judge's official signature, out of his territory, is not an exercise of "judicial authority" in the place where he happened to be at the moment of signing. His authority in such case is, in its very nature and essence, operative only in the court where the suit is pending, and can have no vitality, no force, no effect whatever until the order, as its medium, is filed in and becomes a part of the proceedings in which it is asked for.

It does not appear how or why the fact that the judge, who is a State officer, is personally out of the territorial limits of his court, but within the State, can deprive him of his official character or the capacity to control, in some respect, the proceedings legally pending in his court.

Without some special provision of law on the subject, we do not feel ourselves authorized to adopt such a conclusion. We can readily understand that circumstances may exist when the doctrine invoked by appellee would work great, if not irreparable, injury to a party having the right to appeal.

"Jurisdiction," as defined in Art. 76, C. P. "means the power of him who has the right of judging, or sometimes that word means also the space or extent of country over which the judge is entitled to exercise that power."

Bouvier defines jurisdiction to be "a power constitutionally conferred upon a judge or magistrate, to take cognizance of and decide causes according to law, and to carry his sentence into execution." 6 Pet. 591; 9 John. 239. The tract of land or district, within which a judge or magistrate has jurisdiction, is called his territory, and his power in relation to his territory, is called his territorial jurisdiction.

"Every act of jurisdiction (*i. e.* the power of taking cognizance of and deciding causes) "exercised by a judge without his territory, either by pronouncing sentence or carrying it into execution, is null. An inferior court has no jurisdiction beyond what is expressly delegated."

These definitions clearly relate to the competency, the power of the judge to entertain and pass upon causes in regard to the subject matter, the parties and the place where the action is brought; but do not regulate or restrain his power as to the conduct of proceedings, the jurisdiction of which is legally vested in his court. They do not imply that the judge must always be personally present in his territory, in order to direct incidental matters as they become necessary, in a cause pending in his court, to attain the object of his judicial functions, the administration of justice.

A due consideration of the constitution, nature and powers of our judicial district system, the periods and modes of holding court and conducting business in them, leads to the adoption of the foregoing views. And, while we would not be understood as encouraging even apparent irregularity in the performance of the sacred and responsible duties of a judge, we must maintain what we deem to be the exercise of legitimate authority to secure the rights of parties.

Believing that the order of appeal in this case is not a nullity, because dated in New Orleans, we must hold it to be sufficient to maintain the appeal.

It is therefore ordered, that the motion to dismiss the appeal be dismissed.

STATE v. MATTHEW JURCHE.

The only verdict, in a criminal case, that the jury can render, under the law, is a general one: a verdict of guilty or not guilty, which is a decision both on the law and the facts.

By the Court.—It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide; but they are not bound to do so. They have the right to judge of both the law and the facts in forming their verdict.

APPEAL from the First District Court of New Orleans, *Hiestand, J.*
Hon. B. L. Lynch, Attorney General, for State. *Mills, Fisk & Henderson*, for defendant.

LABAUVE, J. Defendant was indicted for murder, convicted and sentenced.

He appealed.

On the trial of this case in the lower court, defendant asked the judge to charge the jury "that, in finding a verdict, they were the judges of the law and facts."

This the judge refused; but charged "that they were the sole judges of the facts proved. It was their duty to apply the law as laid down by the court. That the jury had the power, but not the right, to disregard the charge of the judge."

The only verdict, in a criminal case, that the jury can render, under the law, is a general one: a verdict of guilty or not guilty, which is a decision both on the law and the facts.

The jury are not presumed to be able, unaided, to ascertain the law ap-

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plicable to the case, among conflicting authorities cited by counsel ; and therefore, the judge is required to charge the jury as to the law.

It, doubtless, would be a safe rule, for the jury to take the law from the judge as their guide ; but they are not bound to do so.

They have the right to judge both of the law and the facts in forming their verdict. See 11 An. 429, 206 and 81. 10 R. R. 81.

Judgment of the lower court is reversed, and the case remanded for a new trial according to law.

HYMAN, C. J., and JONES, J., absent.

C. TIBBEN v. S. D. GRATIA & Co., et al.

Where a party is guilty of laches by not urging his claim in due time and place, he cannot complain in this court.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
C. Dufour for plaintiff and appellant. *L. Castera & G. Legardeur*
for defendants.

HOWELL, J. Plaintiff alleges that he is a mortgage creditor of the succession of Francois Gras, deceased, which was settled as an insolvent estate ; that the property subject to his mortgage was sold, in due course of administration, and the mortgage cancelled by order of the court, and the proceeds applied to mortgages inferior to his, in favor of defendants. He therefore claims from them the amount which he alleges is secured by his mortgage.

Defendants set up the general issue and the plea of *res judicata*.

It appears that plaintiff was a party to the rule taken by the executor to cancel the mortgages on the property of the succession ; that a tableau of distribution was duly advertised and homologated, after disposing of numerous oppositions, that this tableau was brought to the special attention of plaintiff by the attorney of the executor, who says that he requested plaintiff to examine it, in order to ascertain whether he (plaintiff) had any other claims besides those which he held as agent, and for which he was placed thereon ; and that he replied, "It was all right."

We think that under this state of facts, the plaintiff has not brought himself within the application of Article 1176 C. C., and that he is precluded from any recourse upon the fund distributed in said tableau, and that defendants cannot be compelled to return to him any funds received by them by virtue of said judgment of homologation. He was evidently guilty of laches in not urging his claim in due time. See 5 A. 38.

Judgment affirmed, with costs.

JAMES SYME v JAMES STEWART.

Foreign laws must be proved as facts; and, in the absence of such proof, the rights of parties who claim, and the effect and validity of instruments executed under the laws of another State, must be determined by our own, which will be presumed the same.

A PPEAL from the Third District Court of New Orleans, *Dutigneaud, J.* L. M. Day and J. Q. Bradford for plaintiff. A. N. Ogden for defendant and appellant.

ISLEY, J. This suit was instituted in the Third District Court of New Orleans against the defendant, a partner in the commercial firm of Stewart & Pintard, lately established at Rodney, in the State of Mississippi, to recover from him the amount of a bill of exchange drawn by said firm, to the order of John A. Galbraith, on Messrs. Hughes, Hyllested & Co., at New Orleans.

This bill was transferred by the endorsement of the payee; and, for a valuable consideration, came into the hands of the plaintiff before its maturity.

The defendant pleaded a general denial, and set up an equitable defence against the plaintiff, as if this suit had been instituted by the payee of the note; and he relies on a statute of the State of Mississippi, where the bill was drawn, to bring his case out of the commercial law, by which it would otherwise be governed here.

Proof having been adduced of protest, and notice of protest, on the defendant, judgment was rendered against him and in favor of the plaintiff, for the whole sum claimed, with legal interest, and the costs of protest and of suit, and ten per cent. damages; and from this judgment the defendant has appealed.

The statute of Mississippi, on which the defendant relies, is not spread upon the record; and it has been repeatedly held that foreign laws must be proved as facts; and that, in the absence of such proof, the rights of parties who claim, and the effect and validity of instruments executed under the laws of another State, must be determined by our own, which will be presumed the same. *Campbell v. Newport*, 8 A. 124; *Kuentz & Co. v. Elzers, Boje & Co.*, 14 A. 391; *Harris v. Watson et al.*, 9 Rob. 151.

Tested by the law in force here, the decision of the Court *a qua* is correct, except so far as it condemns the defendant to pay ten per cent. damages on the protested bill sued on.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that plaintiff recover from the defendant the sum claimed, twelve hundred dollars, with seven dollars and a half, costs of protest, with legal interest from the 25th February, 1860; the costs of the District Court to be paid by the appellant, those of the appeal to be paid by the plaintiff and appellee.

JONES, J., absent.

SUPREME COURT OF LOUISIANA.

CHARLES E. SCHMIDT v. VICTOR BENIT.

Where there is no prayer for a citation of the appellee, and he is not cited, it is a good ground for a dismissal of the appeal.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Plaintiff in *propria persona*.

LSLEY, J. The appellee moves to dismiss the appeal in this case on several grounds : one of which is that he has not been cited to answer the appeal.

In the petition for an order of appeal there is no prayer for citation on the appellee, and he was not cited. This is good ground for dismissal. 10 Al. 650. 13 La. 50. 5 A. 115.

It is therefore ordered, adjudged and decreed, that the appeal in this case be dismissed, at the costs of the appellant.

HOWELL, J., recused.

CHARLES E. SCHMIDT v. JULES BENIT.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Plaintiff *pro. se*.

LSLEY, J. The appellee moves to dismiss the appeal in this case on several grounds : one of which is that he has not been cited to answer the appeal.

In the petition for an order of appeal there is no prayer to cite the appellee, nor was he cited ; and this is good ground for dismissal. *Bolling v. Anderson*, 10 A. 650. *Walker v. Martolo*, 13 La. 50. *Pratt v. Enom*, 5 A. 115.

It is therefore ordered, adjudged and decreed, that the appeal in this case be dismissed, at the costs of appellant.

HOWELL, J., recused.

B. SALOY, Syndic, v. JOSEPH ALBRECHT.

A sale of partnership property by one of the commercial partners, on the eve of his insolvency, is null and void, and will be set aside. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue each member, although without privilege.

The partnership is dissolved by the *cessio bonorum* made by one of its members; and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. If there is a surplus over the insolvent estate, it goes to his individual creditors.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. E. Filleuel* for plaintiff. *J. L. Tissot* and *C. Dufour* for defendant and appellant.

HOWELL, J. Plaintiff, as syndic of the creditors of P. Marcelin, seeks to set aside two acts of sale to defendant, his partner, by the insolvent, on the eve of his declared insolvency, of certain real estate and the movables on the premises owned by said partners.

There can be no question that the sale of the real estate should be revoked, as it was the individual property of the vendor and commercial partner of the vendee, who, by it, obtained an unjust advantage. Such a sale, at such a time, and on such terms, to an alleged creditor, is prohibited by law. 3 L. 497. 6 A. 774. C. C. 1964, 1979. Acts 1855, p. 432.

The revocation of the sale of the property belonging to the commercial partnership must rest upon somewhat different principles, or the same general principle differently applied.

Can a commercial partner, on the eve of failing, transfer to his co-partner, with knowledge, all his interest in the partnership, so as to exclude the same from his surrender?

We think not. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue either partner, but with no higher rights upon his individual property than his individual creditors have. And neither partner, in failing circumstances, can, by law, do any act which will change the rights or relations of the two classes of creditors, or the appropriation which the law would make of the property.

The partnership is dissolved by the *cessio bonorum* made by one of its members, and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. The partnership debts may not be greater than the partnership assets, and if there be a surplus it goes, in proper proportion, to the individual creditors of the insolvent member, whose syndic has a concurrent right to the administration and settlement of the affairs. See 9 R. 372, *Tyler v. His Creditors*.

The sale, then, by the failing to the solvent partner, may cut off his individual creditors from any possible residuary interest, and from an opportunity of making such interest as large as possible, and may result greatly to their injury.

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The evidence in the record does not show that the partnership assets were less than the debts; but shows conclusively that the defendant was, at the dates of the two sales, aware of his partner's situation, and that he, by said sales, obtained an advantage and preference over the other creditors of the insolvent.

These two sales must therefore be annulled, and the property conveyed be restored to its original *status*, to be disposed of according to law. C. C. 1972. 6 L. 83.

We find no error in the judgment in regard to the alleged claim for rent, prayed for in this court. We do not consider that such a claim was presented, either in the pleadings or by the evidence, in the lower court, so as to settle definitely the reciprocal rights of the parties.

There is error, however, in condemning defendant to pay, in cash, the purchase price on the act of sale, on 23d January, 1858, of the partnership property. According to the principles above recognized, the plaintiff, as syndic, is entitled only to a concurrent administration and a residuary interest. The defendant may be made to render an account of his liquidation or settlement of the partnership affairs, or admit plaintiff to a participation therein, or otherwise be made responsible for the partnership assets. The record does not enable us to determine these matters. Art. 1972 C. C. must be construed with other laws applicable to the questions involved.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and proceeding to render such judgment as should have been given: It is ordered, adjudged and decreed, that the two acts of sale, by Paul Marcelin to Joseph Albrecht, before A. Abat, notary public, on 20th and 23d January, 1858, respectively, be set aside and annulled; that Bertrand Saloy, as syndic of the creditors of Paul Marcelin, recover of Joseph Albrecht, defendant, all the property described in the said act of sale of the 20th January, 1858, to be applied in due course of law to the payment of the claims of the creditors of said Marcelin, reserving to the syndic the right of action, if any exist, for the rent of said property; and that all the property described in the said act of sale of 23d January, 1858, be restored to the joint control of plaintiff, as syndic, and the defendant, to be appropriated or accounted for according to law, reserving to defendant any rights which he may have individually, or as a commercial partner, against the insolvency of said Marcelin.

It is further ordered, that the defendant and appellant pay the costs of the lower court, and the plaintiff and appellee pay the costs of this court.

JEAN LAMOTHE v. CAROLINE LAMARQUE.

Where a judgment bears eight per cent. interest only five per cent. damages will be allowed for a frivolous appeal.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
C. Dufour for defendant and appellant. *P. E. Laresche* for plaintiff.

LSLEY, J. A suspensive appeal was taken in this case by the defendant, from an order of seizure and sale taken out of the Second District Court of New Orleans.

The answer of the appellee in this court prays for an affirmance of the judgment, with ten per cent. damages for a frivolous appeal.

The appellant has not furnished us with any argument, and, after examining the record, we can see no error to her prejudice. It is very evident that delay was her sole object in appealing, and she must, therefore, pay damages.

As, however, the judgment bears interest at eight per cent., five per cent. only as damages will be allowed.

It is therefore ordered, adjudged and decreed, that the judgment or order of seizure and sale appealed from be affirmed, with costs in this court, with five per cent. damages on the principal sum claimed.

JONES, J., absent.

PAUL LAFRANCE v. JOURDAIN MARTIN.

Where the appellee moved to dismiss the appeal, that the case having been tried by a jury, no motion was made for a new trial. *Held:* That it is a good reason to affirm the judgment, but cannot be to dismiss the appeal.

It is not necessary that more than one of the principals and the surety shall sign an appeal bond.

A PPEAL from the District Court of the Parish of Plaquemines,
Cazabat, J. *H. R. Grandmont* for defendant and appellant.

H. Train for plaintiff.—Upon the motion to dismiss the appeal: 9 M. 285; 1 N. S. 713; 2 N. S. 388; 5 L. 446; 3 R. 429; 5 R. 127; 6 R. 362; 15 L. 466; 17 L. 336. The above decisions of the Supreme Court, affirming the principle that judgments of inferior tribunals, founded on verdicts of juries, should never be brought before the Supreme Court without showing that an attempt had been made to obtain a new trial.

2. Parties not giving an appeal bond cannot be heard as appellants. 7 A. 589; 9 A. 158. Appeal dismissed when all parties are not mentioned in the appeal bond. 13 A. 441, 296. 11 A. 409, 675. 15 A. 496, 523. 12 A. 72. 15 A. 529.

3. It is not part of the duty of a clerk to prepare an appeal bond, so as to bring any irregularity in its execution within the 19th section of the

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statute of 20th March, 1839, authorizing the Supreme Court, in certain cases, to grant time for the correction of errors or irregularities. 2 A. 902, 452.

4. When the appeal bond, at the time of filing the appeal, does not contain the name of the obligees, or the style of the suit and judgment appealed from, it is insufficient, and the appeal will be dismissed. 6 L. R. 586.

LABAUVE, J. The plaintiff's demand is for \$725 with interest, on a note of defendant, dated, 12th April, payable in November, 1862. Pending the suit below the defendant died, and the plaintiff had his heirs, four in number, made parties; they appeared, and pleaded as an exception, that plaintiff, on his own showing, could not maintain his action upon the note which had been given in part payment of a negro; and further, that they were not indebted to the plaintiff as alleged in the petition. On motion of plaintiff, the case was ordered to be tried by a jury. The court ordered that the exception be made a part of the merits. The plaintiff offered in evidence the note sued upon, and the endorsements of the payees were admitted. The jury gave a verdict for plaintiff, and no attempt was made to set aside the verdict. The judge gave judgment accordingly.

From this judgment the four defendants moved for an appeal, and it was granted. The appellee has moved to dismiss the appeal on the grounds: 1. That the case having been tried by a jury and no motion made for a new trial, this court cannot entertain jurisdiction in the premises. 2. That the appeal bond is not made in conformity with the law, and is not binding on all the appellants. 3. All the parties are not before this court.

The first ground might be a good reason to affirm the judgment, but cannot be a good one to dismiss the appeal. As to the second and third grounds, our attention has not been called to the particular defects contemplated by the appellee. The bond seems to be substantially in form; it is signed by one of the principals and the surety; it was not necessary that all the principals should have signed it.

Motion to dismiss overruled.

On the merits, we are of the opinion that the verdict of the jury and the judgment of the court are correct; besides, the defendant did not move for a new trial, and the judge was bound to render judgment according to the verdict. 15 L. 466; 17 L. 336.

It is therefore adjudged and decreed that the judgment appealed from be affirmed, with costs.

JONES, J., absent.

W. H. LETCHFORD & Co. v. JACOBS; HARRISON et als., Intervenor.

Where parties are not shown to have been in actual or constructive possession, as owners, of the property at the time it was attached, they have not the right to bond it.
The intervention may stand, although the motion to bond by the intervenors be dismissed.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. Benjamin, Bradford & Finney* for plaintiffs. *Carleton Hunt, curator ad hoc*, for defendant.

Durant & Hornor for Intervenor and appellants.—The plaintiffs, a commercial firm in New Orleans, brought suit by attachment against H. Jacobs, a resident of Mississippi, on a promissory note of \$1,078 98.

A quantity of merchandise was attached in the hands of Thomas McKenna, a warehouseman.

George P. Harrison intervened, claiming the goods attached, in consequence of a deed of trust executed in his favor, in New Orleans, on the 17th August, 1860, by the defendant Jacobs, to secure certain commercial firms in New York, for certain amounts due them by the said Jacobs, and to protect them against the seizure of goods they had sold him by his old creditors; that, subsequently, the intervenor took actual possession of said goods before the attachment.

After this, certain creditors residing in New York intervened, alleging themselves to be the vendors of a portion of the goods attached, and claiming the same under the legal right of stoppage *in transitu*.

The intervenor Harrison, and the creditors aforesaid, then took a rule upon all parties, calling on them to show cause why they should not be allowed to bond.

This rule was tried on the face of the papers, and judgment given that they showed no cause of action in favor of the petitioners in intervention, on three grounds:

1. As to the creditors: "That, to authorize the stoppage *in transitu*, the insolvency of the purchaser must have occurred *subsequent* to the sale of the goods, and that this defendant was insolvent before the purchase."

2. "That the delivery to the defendant's agent is delivery to his principal."

3. With regard to Harrison, the trustee: "That the trusteeship, by which the agent seeks to take possession of the property, is a title not recognized by our law."

The contract of sale having been made, and the goods sold to Jacobs on a credit, in New York (a State where the common law prevails), the right of stoppage *in transitu* existed in favor of the vendors. "It is a privilege allowed to the seller for the particular purpose of protecting him against the insolvency of the consignee." *The Constantia*, 6, C. Rob. p. 326.

"To enable the vendor to exercise this right, the goods must be unpaid for, the vendee must be insolvent, and the goods must be *in transit*." *Story on Sales*, § 326. *Abbott on Shipping* (Boston, 1846,) p. 614.

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That the goods were sold and shipped on credit is apparent from the face of the papers, and is nowhere denied.

It is in the same way apparent, and also not denied, that Jacobs was insolvent. But, it is pretended that, in this case, Jacobs was insolvent at the time of his purchases in New York, and that it is only in cases where the insolvency occurs after the purchase that the right of stoppage exists.

This illegal doctrine would leave without remedy a creditor who had, at the time of sale, been deceived as to his debtor's real condition : there is no foundation whatever for it in law. It has, indeed, been said that "it seems that the vendor is not entitled to the right of stoppage *in transitu*, if at the time of the sale he knew the debtor to be insolvent. See *Buckley v. Furness* (erroneously quoted in the above edition of Abbott, in note on p. 614, as 17 Wendell, 504) in 15th Wendell, p. 143, where the court said : "Still, it may be, and probably is, true that, if the plaintiff sold the iron with a full knowledge of the situation of the vendee, he could not afterwards exercise the right of stoppage *in transitu*; but the argument is not borne out by the facts of the case. The truth is, no doubt, that the plaintiff was deceived by the false representations of Titus, and the credit was fraudulently obtained. There is, then, nothing in this branch of the argument which militates against the right of the plaintiff to re-take the goods.

So in the case at bar, it is expressly alleged, and the allegations are to be taken as true, by the intervenors, that the creditors were ignorant of Jacobs's insolvency, and that he purposely concealed from them the circumstance of his indebtedness on prior claims, to other creditors.

The only other point to be considered is whether the goods were *in transitu*. The vendors lived in New York, the vendee in Brookhaven, Mississippi, and the goods were to be sent from the former point to the latter; they came by the way of New Orleans, and were seized in the warehouse of McKenna, who was merely a middleman and not such an agent for the receipt of the goods as would make his receipt such a delivery as to terminate the *transitu*. All the authorities are clear on this point. See the case of *Buckley v. Furness*, 15 Wendell, 143, 17; do. 504.

If it be contended that there was a delivery at New Orleans, to Harrison, the trustee, the reply is, he was the agent of the vendors and not of the vendee.

The only question left is as to the validity of the deed of trust. Nothing in our law prohibits a Mississippi debtor from transferring to the agent of his creditors goods bought by him, unpaid for and then in *transitu*; for, as the creditors had a right to stop them, so the debtor had a right to deliver them; after this delivery the debtor, Jacobs, had no control of the goods, and therefore the plaintiff, an old creditor, could not attach them.

HOWELL, J. Plaintiffs, residents of New Orleans, brought suit against defendant, residing in Brookhaven, Mississippi, and attached property in the hands of a garnishee, who answered that he had in his warehouse several packages of merchandise belonging to defendant, which was taken into the possession of the sheriff.

Subsequently, one George P. Harrison intervened, claiming said goods by virtue of a deed of trust, executed in this city, and alleged to be duly

recorded in Mississippi, by which defendant sold to intervenor, in trust, to secure debts due certain named creditors in New York and New Orleans, all the goods and fixtures in his store in Brookhaven, and all goods then in transit between New York, New Orleans and Brookhaven.

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Several of said creditors in New York also intervened as vendors, setting up said deed of trust, and asked judgment for their respective claims, to be paid out of the proceeds of the property attached.

The intervenors, claiming the goods as trustee and as vendors, with the right of stoppage *in transitu*, then took a rule on the plaintiffs, the defendant and the sheriff, to show cause why they should not be allowed to bond said property in conformity to law.

On this rule judgment was rendered, dismissing *the interventions* and the rule, from which defendants have taken a devolutive appeal.

In the case of *Hughes v. Klingender*, 14 A. 52, it is said: "The law confers upon the *defendant only* the right to set aside the attachment by giving bond. C. P. 259; Acts 1852, p. 165. It is not conferred on the creditors.

"It is true the courts have allowed, under an equitable construction of the Article, an intervenor, having possession and claiming to be owner to bond, in order to avoid the great injury which third persons might suffer by the unjust seizure of their property."

The intervenors in this case have not brought themselves within the application of this equitable construction of this Article of the Code of Practice.

They are not shown to have been in actual or constructive possession, as owners of the property, at the time it was attached. The one claimed simply as trustee, for the purpose of paying the creditors, and not as real owner. The others claimed as vendors, with the right of stoppage *in transitu*, which, when exercised, does not operate to rescind the contract of sale, but only enables him to enforce his lien.

They are, then, without the right to bond; but there is error in the judgment in dismissing the interventions on a motion to bond. The intervenors may be able to establish their rights, if any they have.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be reversed, so far as it dismisses the interventions herein, and that this cause be remanded to be proceeded in according to law, the appellees paying the costs of appeal, and appellants the costs of the proceedings in the lower court, on the rule to bond the property attached.

GUSTAVE MOURAS v. SCHOONER A. C. BREWER, CAPTAIN AND OWNERS.

Where a statute has been repealed since the rendition of a judgment, inflicting a penalty, in the court *a quo*, this court cannot affirm it.

APPEAL from the Second District Court of New Orleans, *Morgan, J. C. Dufour* for plaintiff. *Clark & Bayne* for defendants and appellants.

LSLEY, J. In this suit the plaintiff claims from the defendants *in solido*, with a lien on the schooner: 1. The sum of two thousand dollars, the value of his slave Arthur, alleged to have been illegally transported out of the State, some time in June, 1859, on board of the schooner A. C. Brewer.

2. The sum of two hundred dollars, amount of damages alleged by plaintiff to have been sustained by him in consequence of the loss of his slave's services, etc.; and, 3. The sum of five hundred dollars, the amount of the penal fine imposed by law in such cases, with privilege.

There was judgment in the Second District Court of New Orleans in favor of the plaintiff, and against the defendants *in solido*, for the several amounts claimed, with interest and costs, but without a recognition of privilege on the schooner, as asked for by the plaintiff.

The defendants, who had pleaded the general issue, took a suspensive appeal from the judgment.

The main question involved in the case is exclusively one of fact; and, after a very careful perusal of the whole testimony adduced, in which there is some discrepancy, we think it preponderates in favor of the plaintiff, and that the law sustains his claim. 2294 C. C. 2299. *Winston v. Foster*, 5 R. 115.

We cannot, however, affirm the judgment *in toto*; as, since its rendition, the statute imposing the fine of five hundred dollars has been repealed, which takes from this court the power of imprisonment. See *Quarles v. Evans*, 543, 7 An.; *The State v. Johnson*, 12 La. R. 547.

The judgment of the lower court is therefore reversed, and proceeding to give such judgment as shall have been rendered in said court, it is ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the plaintiff, and against the defendants *in solido*; 1. For the sum of two thousand dollars, the value of the slave; and, 2. For the sum of four hundred dollars, for loss of his services, etc., with interest on the whole from judicial demand, and that the costs of appeal be paid by appellant.

HOWELL, J., dissenting. I am of opinion that responsibility, under pleadings and evidence of this case, can be fixed upon the defendants only by virtue of the strict and severe provisions of the act approved March 25, 1840, and the several acts which it amends; and that, as this legislation is now wholly abrogated, plaintiff is without remedy.

The purpose of those statutes was a stern and stringent protection of

this class of property from loss by the bad faith or negligence of those engaged in the navigation of water courses.

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Without them, the liability of navigators before our tribunals rests upon the general provisions of the commercial and civil law, and, under their application, I can find no fact in the record which makes the defendants responsible to plaintiff as charged.

It appears that defendants' vessel was, for that voyage, chartered by an agent of the Haytien government to transport a number of emigrants to the island of St. Domingo, and that those in charge of the expedition, as well as the officers of the vessel, *used every possible precaution, prior to embarking, to avoid the occurrence of an arrest, such as that for which the defendants are sought to be made liable.*

If it be true that the man, claimed by plaintiff to be his slave, was a passenger at the time, on defendants' vessel, I cannot see that any principle of law, not contained in the above statutes, will make them responsible to plaintiff until it is shown that they, or those in their employment, *knew him to be a slave, or that they were guilty of some neglect, imprudence, or want of skill.* This has not, in my opinion, been shown. The only witness who testifies positively that plaintiff's slave was on board was not himself a passenger; and he does not state that the officers of the vessel had any knowledge of the fact; and no one witness establishes *any act or negligence on the part of defendants, or those for whom they are answerable, calculated to make them responsible, independently of this special and repealed legislation.*

There were several black persons on board; and, after the precautionary measures taken by them, there was nothing to excite their suspicions. They are certainly not responsible for the devices or deceptions of their passengers.

The presumptions of law and the special safeguards in behalf of this particular class of property no longer exists.

After a careful examination of the cases of this nature in our books, the laws now applicable to the subject matter, and the pleadings and evidence in the record, I am constrained to dissent from the opinion of the majority of the court.

I think the judgment should be reversed.

ROBERT MOORES & Co. v. GEORGE P. McCONNELL.

An error of calculation, patent on the face of the record, made in the court below, will be corrected on appeal without suggestion.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Fellows & Mills for plaintiff. *Hunton & Miller* for defendant and appellant.

LABAUVE, J. The plaintiffs claim against the defendant the sum of \$650 39, with interest from August 8th, 1854, as a balance due for lumber furnished, principally under a contract. and partly on account.

The defendant in the first place answers by a general denial, but admits that he made a contract with plaintiffs, by which said plaintiffs bound themselves to furnish all the lumber to construct the fence around the House of Refuge, for the sum of \$1,700. He avers that said plaintiffs failed to supply him with all of said lumber; that said plaintiffs were put in default for non-compliance with their contract; that he had to purchase lumber from other persons; that the lumber was not delivered at the place agreed to, but to a considerable distance therefrom, &c. He further says that he has paid said plaintiffs, on account of said contract, the sum of \$1,336, and that he holds a promissory note of said plaintiffs for \$100; making in all \$1,436, which he avers is more than a full compensation for all the lumber furnished to him by said plaintiffs. He says he has sustained damages to the amount of \$586 50, in consequence of the plaintiffs not complying with their contract; which sum he pleads in reconvention, and prays judgment accordingly.

The District Judge, after hearing evidence, testimony and arguments of counsel, gave judgment for plaintiffs as prayed for, but omitted to allow the defendant a credit for \$36 50, for which the plaintiffs entered a remittitur at once before the court, and now pray that the judgment be modified accordingly.

We have not been favored with briefs of counsel, either oral or written. We are of the opinion that the judgment of the court below is correct, exclusive of the omission in not allowing the credit alluded to.

It is therefore adjudged and decreed that the judgment appealed from be amended so as to allow the said credit of \$36 50, and that as amended it be affirmed, with costs.

JONES, J., absent.

LAURENT MILLAUDON v. CHARLES H. DAVIS.

Where an acting judge signed an order as "Judge of the Second District Court," omitting the word "judicial;" *Held*: That it was sufficient.

A PPEAL from the District Court of the Parish of St. Bernard, Bermudez, J. P. A. Ducros for plaintiff. G. S. Lacey for defendant and appellant.

HYMAN, C. J. Defendant appealed from an order of seizure and sale.

The Judge of the Second Judicial District having recused himself, Judge Bermudez, by authority of section 32 of an act entitled "an act relative to district courts," approved March 15, 1855, granted the order.

It is not contended that the order was granted on insufficient evidence, or that Judge Bermudez, as Judge of the Second District Court of New Orleans, was incompetent; but it is argued that, by the manner in which he signed the order, it does not appear in what court he was acting.

The judge, after writing the order, signed it thus: "New Orleans, July 27th, 1861, J. Bermudez, Judge of the Second District Court, acting in the place of Judge Burthe, recused."

We think that the signing of the order in this manner shows that Judge Bermudez was acting as the Judge of the Second District Court of New Orleans, and not as Judge of the Second Judicial District of Louisiana.

The order of seizure and sale is affirmed, with costs of appeal.

JONES, J., absent.

NIMICK, McCLOSKEY & Co. v. GEORGE INGRAM.

A creditor of an insolvent debtor who opposes the appointment of syndic, or charges fraud against the debtor, must do so within ten days next following the meeting of creditors, by written opposition, before the court, stating specially the several facts of nullity of the appointment or fraud alleged against the insolvent debtor. Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender.

The acceptance for the creditors by the court vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them; but any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim.

A PPEAL from the Fifth District Court of New Orleans, Eggleston, J. Durant & Hornor for plaintiffs and appellants.—Plaintiffs having seized the property of defendant on *fi. fa.*, were about selling it by the

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sheriff, when they were enjoined by John Robertson, claiming ownership. The property was declared not Robertson's, but the execution debtor's. Ingram attempted to make a cession and thus to deprive plaintiffs of the effect and fruit of their execution. From a judgment sustaining this opposition plaintiffs have appealed.

We submit: 1. The fruits of the litigation in the contest between plaintiffs and John Robertson belong to the plaintiffs, are *their property*, and cannot be taken away from them by the subsequent cession of the fraudulent debtor.

There is certainly no principle of justice that would justify, on the part of the court, a course which would deprive the plaintiffs of the full benefit of their judgments. C. C. 1972. *Townsend v. Miller*, 7 A. 682, 632. *Decuir v. Venzey*, 8 A. 453. *Freeman v. Creditors*, 15 A. 397.

2. The surrender of the property was a pure sham, like the sale to John Robertson. The dates conclusively show this, *e. g.*: the meeting of creditors is called for 21st July, 1859: the proces-verbal is only filed on the 7th February, 1861, about the very day the injunction in Robertson's case was decided.

3. The property in dispute never was surrendered to the insolvent's creditors. His sham sale to Robertson was a perpetual estoppel to such a course. *Freeman v. Savage*, 2 A. 269; also, 5 A. 16; 4 A. 416; 5 A. 107; 10 A. 530, 585; 14 A. 140.

LSLEY, J. This is an appeal from a judgment rendered by the Fifth District Court of New Orleans, on a rule taken on the plaintiffs by the defendant, to show cause why all process under their judgment in this suit, originally pending in the Fourth District Court, should not be stayed and set aside, as being in violation of a decree of said Fifth District Court, ordering all proceedings to be stayed against the property of the defendant, an insolvent debtor.

In order to comprehend the principal question involved in this controversy, it becomes necessary to make a comprehensive statement of all the facts which relate to it;

On the 16th June, 1859, the defendant Ingram made a surrender of his property to his creditors, in the Fifth District Court of New Orleans, and attached, to his petition for a cession, his schedule, mentioning thereon the names of his creditors, among which were those of the plaintiffs, Nimick, McCloskey & Co., their place of residence and nature of their claim.

On the same day the said court, by its decree, accepted, for the benefit of the creditors, the cession made by the insolvent, ordered a meeting of the creditors to be held on a certain day, before a notary public, for the purpose of deliberating on the affairs of the insolvent, and of appointing one or more syndics; and appointed an attorney to represent the absent creditors. All judicial proceedings against the person and property of the debtor were, by said decree, ordered to be stayed.

Due and legal notice was given to the plaintiffs to attend the meeting of creditors, which was held on the 21st July, 1859.

It was not until the 7th February, 1861, that a copy of the proces-verbal of the proceedings of this meeting were deposited in the office of

the clerk of the said court, when, on motion of the defendant's counsel, the said proceedings were approved and homologated; and, the creditors not having attended the meeting and appointed a syndic, the court authorized the sheriff of the parish of Orleans to perform, in every respect, the functions of a syndic.

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On the 3d October, 1860, the plaintiffs caused to be issued from the Fourth District Court of New Orleans (where their suit against Ingram was pending), execution on their judgment, and under it seized, as the property of the judgment creditor and in his possession, to satisfy their claim, the contents of a certain liquor store.

Previous to the day fixed for the judicial sale of the seized property, one John Robertson intervened by third opposition, and claimed it as belonging to him, in virtue of a sale thereof, which, by notarial act, bearing date 17th March, 1860, he pretended Ingram had passed to him; but it having been proved on the trial of this third opposition that Ingram had always retained the actual possession of the property claimed by Robertson, it was decided by the court that his title thereto was simulated and fraudulent, and his opposition was dismissed; whereupon the plaintiffs proceeded with their execution, and the sheriff's sale of the seized property was advertised to take place on the 27th February, 1861.

On the 12th day of February, 1861, a rule was taken by Ingram, in the Fourth District Court of New Orleans, on Nimick, McCloskey & Co., to show cause why all the proceedings in the said suit against him should not be transferred to the Fifth District Court of New Orleans, and cumulated with the insolvent proceedings.

This rule was tried contradictorily with the plaintiffs, and after argument of counsel was made absolute, and from this decree so rendered no appeal has been taken.

On the 20th February, 1861, Ingram took out of the Fifth District Court a rule on the plaintiffs to show cause why they should not respect the order of the court, suspending all proceedings against him, and why all further action under the writ of *fi. fa.*, sued out by plaintiffs on their judgment, should not be stayed and set aside.

This last rule, after trial and argument, was also made absolute, and from the decree of the court thereon the present appeal has been taken.

The appellants, Nimick, McCloskey & Co., urge in this court several grounds for the reversal of this judgment, which grounds substantially amount to this: That the plaintiffs, by their diligence and vigilance, have discovered the property seized by them, which was never surrendered by the insolvent to his creditors; and that, at their own cost, they have freed the said property from the fraudulent and simulated claim set up to it by a third person, and having thus made it available, they have the legal right to appropriate it to the satisfaction of their claim.

That Ingram having fraudulently attempted to screen this property from his creditors, it is legally incompetent for him to take any steps, in relation to the property seized, to affect their rights.

What these rights are it is not necessary for us to decide, and being satisfied, as we are, that they can only be determined contradictorily with the mass of the insolvent's creditors, before the court seized of the *concurso*, as the whole proceedings in the suit pending originally in

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the Fourth District Court were, by the judgment thereby rendered on the 20th February, 1861, properly ordered to be cumulated with the insolvent proceeding in the Fifth District Court. See the case of *Fabre v. McRea*, 14 Al. 648.

We are clearly of opinion that, however irregular the proceedings in insolvency may have been, and however fraudulently the debtor may have acted, the plaintiffs could not, on that account, disregard the behests of the decree of the court, which stayed all judicial proceedings against the insolvent and his property. They were parties to the proceedings, and were bound to respect them. *Armstrong v. Mooney*, 167, vol. 1 Rob.; *Taylor et al. v. Their Creditors*, 9 Rob. 376.

No objection seems to have been made to the appearance of Ingram, in the rules taken by him on the plaintiff, on the 12th and 21st February, 1861. It should have been made in the District Court by way of exception, if relied on, and all opposition to the legality or validity of the insolvent's proceedings, on account of fraud by the debtor, should have been urged in due time, in the manner required by law. See §§ 22 et seq., p. 255, Revised Statutes. It would have been too late, after the legal delay, even if the fraud had been discovered after its expiration. *Mathews v. His Creditors*, 11 Al. 36.

Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender made by his debtor, and granting a stay of proceedings. *W. A. Hayney v. John Healey*, 12 Al., 424.

The acceptance for the creditors by the court of the ceded estate, vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them. *Dwight, syndic, v. Simon et al.*, 4 An. p. 490; and *Dwight v. Smith, tutor*, p. 33, 9 Rob. But any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representative, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim. And this is the remedy of the plaintiffs, if any they have. See *Marsh v. Marsh et al.* 9 Rob. 47; C. P. 165, § 3.

There is no error in the judgment of the lower court, and it is therefore ordered that the same be affirmed; the costs of appeal to be paid by the plaintiffs and appellants.

ANDREW McCULLOM v. PORTER, THOMAS & FOLEY.

A depository is not answerable, in any case, for acts produced by overcoming force; such as fire, unless he failed to use proper diligence.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor for defendants.—The plaintiff sues the defendants for damages on an alleged *refusal to deliver* a portion of sugar confided to them, as depositees or bailees. There is no allegation in the petition, either of want of good faith, or of reasonable care, or of ordinary diligence. Under general principles of law, warehousemen “are responsible for want of good faith, and of reasonable care and ordinary diligence, and not to any greater extent.” 2 Kent, p. 591; La. Code 2908, 2909, 2910; 1 Larombiere, p. 406.

As to *force majeure*: L. C. 2151, 2216, 2693.

The burden of proof is on the plaintiff. After we had shown the loss by fire, if plaintiff still intended to hold us responsible for our fault, it is for him to prove it. Brileux on C. N. 1147, 1302; Troplong, Nantissement, § 432.

Even under the Code Napoleon, 1733, which is directly the reverse of our Louisiana Code, 3493, the burden of proof is on the tenant only as to the immovable and not as to the movables of the owner. Sirey, 34, 2, 241; Larombiere, C. N. 1148. See also 2 Salkeld, p. 655; and Reporter's note in 7 Cowen, 500.

“A warehouseman is bound only for ordinary care, and is not liable for a loss from accident when *not in default*; and *not in default* when he exercises such due and common diligence in the care of goods entrusted to him as he would bestow in the care of his own.” Edwards on Bailments, p. 284; *Schmidt v. Blood*, 9 Wendell, 271; Troplong, Dépôt, § 63 *et seq.*

Additional authorities: Story on Bailments, § 442, p. 289 and note at foot of page; 4 Larombiere, p. 5.

LABAUVE, J. The plaintiff alleges that the defendants, commercial partners in the city of New Orleans, are justly indebted *in solido* to him, in the sum of \$11,680; for this, that, at divers times, from the 31st January to the 6th February, 1860, the defendants received on storage from him, and on his account, 170 hhds. of sugar, which they agreed to house and restore to him on demand, in consideration of a reasonable compensation for the storage and preservation; that on or about the 30th April, 1860, he made a demand for the delivery of said sugar, and that they restored to him only 24 hhds., having 146 hhds. which they have neglected and refused to deliver, and for which they are bound to account, at the value the same bore on the 30th April, 1860; that said sugar was worth, at that time, \$80 per hhd., making in the aggregate \$11,680.

McCULLOM He prays for the delivery of said sugar, or, in default thereof, for its
PORTER et als. value, \$11,680.

The defendants admitted, in their answer, the storage of the sugar, 170 hhds; of which 146 hhds. perished by fire on the 24th April, 1860, so that they were only able to deliver 24 hhds. out of the 170, on account of the same having been stored in a brick warehouse, and which escaped the fire; that this fire was, as to respondents, an inevitable casualty, for the effects of which they were not liable in law. They added a general denial, not inconsistent with the foregoing defence and statements. They claimed, in reconvention, of the plaintiff \$159, for storage of sugar stored with them. They prayed for judgment accordingly.

The court below, after hearing the testimony, gave judgment for the defendants, and the plaintiff appealed.

The destruction by fire of the warehouses where the sugar was stored, was proven, as alleged in the answer; at the time there was a large quantity of goods, sugar and cotton, stored in the warehouses, and there were many losers besides the plaintiff. The accident by overpowering force being clearly proven, it was incumbent on plaintiff to sustain his demand, to show that the loss had been caused by the fault or neglect of the defendants; nothing of this is shown; on the contrary, the defendants are proven to be careful men, attentive to their business; their loss was heavy by this fire. We have carefully examined the testimony, which is very voluminous, and we see nothing to satisfy us that the District Judge has erred in coming to his conclusion. C. C. Arts. 2908, 2909, 2910; Story on Bailments, Art. 442; Edwards on Bailments, p. 284.

The plaintiff and appellant has made no appearance in this court.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed, with costs.

HOWELL, J., recused.

McCAN & HARRELL v. STEAMER GOLDEN AGE, et als.

Citation being the essential ground of all civil actions, in ordinary proceeding, the neglect of that formality annuls radically all proceedings had, unless the defendants have voluntarily appeared in the suit and answered the demand.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
B. Egan, for plaintiffs.

HYMAN, C. J. Judgment was rendered against defendant, Joseph R. Shannon, recognizing therein a privilege on the steamboat Golden Age. He has appealed.

This case has to be remanded, because defendant did not appear and answer in the lower court, and citation was not served on him. See Code Practice, 206.

Judgment is reversed, and the case is remanded, to be proceeded in according to law.

JONES, J., absent.

F. DESPLATE v. N. St. MARTIN, et als.

Where a debtor waives an appraisement, when called upon by the sheriff, of a sale of his property on *f. fa.*, and purchases part of the property himself, he cannot complain of the irregularity of the proceedings.

A PPEAL from the District Court of the Parish of St. Charles, *Burthe, J.*
S. F. Glenn and W. W. Handlin for plaintiff and appellant.—The petition shows the nature of the action: a suit to annul a sale made by a sheriff without due appraisement or advertisement, and for damages caused thereby.

We contend that the sale was invalid for the want of due appraisement, the formality of which is sacramental, and which cannot be waived by either party, and notice of which must be given in writing. C. P. 671. Says this honorable court in the case of *Louis v. Gordy*, 5 An. 570: "The rule that the formalities are to be strictly observed, is rather for the benefit of the debtor and purchaser than the creditor." Again, in the case of *Esnault v. Cooley*, tutor, 16 An. 165, Chief Justice Merrick held that the waiver of the advertisement deprives a sale by the sheriff of its character as a formal sale. Where the law is sacramental the maxim of *volenti non fit injuria* does not apply. His waiver of appraisement did not dispense with the responsibilities of the sheriff. A stipulation that a sale

DESPLATE should be made without appraisement ought not to be enforced. 15 An.
ST. MARTIN et al. 243. Damages are recoverable by Article 2295 of the Civil Code, and the
 decisions made under it. "A sheriff is liable in damages if defendant in
 execution lose by the property being sold in an illegal manner." *Crocker*
v. Watkins, 4 Martin, 540.

H. F. Deblieux for defendants.—The plaintiff relies for recovery on the omission of the appraisement of the property seized; and, in argument, it is contended that there was no notice of seizure. As to this last point, the sheriff's returns, as well as the sheriff's deed, dispose of the question, for they say that notice was given, and all formalities complied with.

As to the first ground, true it is shown that no appraisement was made; but, at the same time, the evidence shows why it was not made, and that the defendant in execution dispensed with it.

The testimony of a witness unimpeached and uncontradicted, whose testimony was unopposed, and to which the judge below has thought he must give entire evidence, shows that when Desplate was notified to appoint an appraiser he declined, not contumaciously, but for the reason, he alleged, that the property was mortgaged for enough to insure its sale at a sufficient price. When called upon to signify his waiver in writing, he said there were persons enough around to bear witness to it.

HOWELL, J. Plaintiff sues to annul a sale of his personal and real property, made by the sheriff of the parish of St. Charles, under two writs of *fi. fa.*, issued upon judgments against him in the District Court of said Parish. He complains that his property was "illegally seized and sold without appraisement, and without complying with any of the requisites of the law."

The sheriff's return on the two writs, and deed of sale of the real estate, are in the usual form, reciting the seizure, notice, advertising and observance of the legal requisites. It appears, however, from the testimony of the witnesses, that there was no appraisement of the property made; but it appears also that the defendant was present, and when called on by the sheriff to appoint an appraiser, he declined to do so, on the ground that the landed property was mortgaged for more than two-thirds of its value, and an appraisement was unnecessary. He also became the purchaser of the horse sold at the time. He thus waived the appraisement and ratified the sale, and cannot now be heard to complain for the causes urged by him. He has not shown that the property was sacrificed or sold for less than its true value.

Judgment affirmed, with costs,

JAMES M. & W. H. PETERSON v. PETER H. WILLARD.

Where a suit is commenced by a writ of sequestration, the judgment of the court below should have been *in rem* alone, reserving to the plaintiffs their right to an action *in personam*.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
J. N. Lea for plaintiffs.—The plaintiffs, who are vendors of the property described in the petition, sue for the amount due them, and ask for judgment as claimed, with the privilege of vendors upon the property sold. This property being in the parish of Orleans, where the debt became due, the plaintiffs obtained a writ of sequestration, and caused a portion of the property subject to their lien to be seized by the sheriff of the parish of Orleans. Personal service of citation was made upon the defendant, to whom the property was released on his giving bond, according to law.

The defendant filed a plea to the jurisdiction of the court, on the ground that his residence being in the parish of Jefferson, he could be sued only in that parish. This exception being overruled, the case was tried on its merits, and judgment was rendered in favor of the plaintiffs.

Upon the merits of the case there is no defence, the debt sued for being established by notarial act. It is true the counsel for the appellant urges that the claim for \$1,732 30 was payable only in instalments, which had not matured at the date of the seizure; but, apart from the fact that no exception was filed to the pre-maturity of the action, a reference to the notarial act itself will show that the utmost delay allowed for the maturity of these instalments was "four months from the date of the act," which was passed on the 19th day of March, 1860, and a reference to the return upon the writ of sequestration will show that the seizure was not made until the 20th day of July, 1860.

It was not incumbent on the plaintiffs to show "that the defendant had not used proper diligence to collect the assets of the partnership:" 1. Because the defendant had bound himself absolutely to pay the debt "within four months from the date of the act;" and, 2. Because if any facts existed which would have released the defendant from his obligation, it was his duty to have established such facts affirmatively.

Passing to the merits of the exception of domicile, it is respectfully urged: 1. That, in the jurisprudence of this State, it is well settled that when a party seeks to exercise a lien or privilege upon property, and to subject it to the payment of his privileged claim, he has a right to assert his claim in the court having jurisdiction of the place where the property is situated; otherwise he would be without redress. See *Henning v. Steamer St. Helena*, 5 An. 352; *Heirs of Lalaurie v. F. A. Wood*, 8 An. 366; *Gails v. Schooner Osceola*, 14 An. p. 54. Indeed, this doctrine is so well settled that the appellant's counsel has not contested it, but contends that, in such a case, the judgment should be restricted to the enforcement of

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the privilege upon the property sequestered, and should not extend to a personal judgment against the debtor.

It is freely conceded that where the proceeding is *in rem*, and the jurisdiction of the court attaches only in virtue of the seizure of property, the judgment, as in the case of the attachment of the property of non-residents, could affect only the proceeds of the property attached. But this restriction could not, by fair and reasonable construction, be extended to cases where there was personal service of citation, and an appearance on behalf of the defendant, as in the case at bar. Be this as it may, the defendant is estopped from urging any such plea. In the authentic act, which is the basis of this suit, the defendant contracts with the plaintiffs as "Peter H. Willard, of the city of New Orleans." Of course, such a recital is not conclusive as against third parties not privy thereto, and as respects such third parties is open to contradiction. See *Hill v. Spangenberg*, 4 An. p. 553; also *Davis v. Binion*, 5 An. 248. But in these very decisions the court carefully restrict the right to contradict the recitals contained in authentic acts to those who are not parties thereto, the court not considering such recitals, in contracts with third persons, as conclusive upon the party making them, in a contest with others upon a question of jurisdiction. It is manifest that, in a contest with a party to the act itself, no evidence would be deemed admissible to contradict any averment contained in the act. "Parole evidence shall not be admitted against or beyond what is contained in an authentic act, nor on what may have been said before, nor at the time of making them, nor since." Civil Code, 2256.

The truth or falsehood of the recital has nothing to do with the question. The prohibition rests upon considerations of public policy, and the court will not enter upon an investigation, or adopt conjectures, concerning the importance or immateriality of recitals in an authentic act, in a controversy between the parties to the act. Every recital or averment in an authentic act is presumed to have entered into and formed part of the contract. It is to be remarked that nothing in the evidence shows a change of domicile after the execution of the act.

Buchanan & Gilmore for defendant and appellant.—Plaintiffs claim of defendant a personal judgment for the sum of \$3,732 30, with privilege of vendor upon certain property (coal, carts and mules) which were sequestered.

Defendant pleaded a declinatory exception, that he resides and is domiciled in the parish of Jefferson, where his family dwell and where is his principal establishment.

On the trial of this exception, two witnesses, *W. G. Coyle* and *W. H. Foster*, proved that defendant's residence and that of his family was at the time, and had been for many years, in Jefferson City, parish of Jefferson, where he voted, etc. No evidence was offered to contradict this testimony, and we may therefore assume that the domicile of the defendant was, as alleged by him, in Jefferson parish.

The court, notwithstanding, overruled the exception; and defendant pleaded the general issue (with a reservation of his exception).

Judgment was rendered in the court below for the whole amount

claimed against the defendant, with vendor's privilege upon the property sequestered. Defendant appealed.

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Since the appeal was taken defendant has died, and his widow is made party defendant.

We contend that the court has erred in overruling the declinatory exception, and rendering an unqualified personal judgment against defendant.

The Article of 162 of the Code of Practice lays down the general rule that civil actions must be brought before the judge having jurisdiction over the place of domicile or residence of the defendant.

The following Articles (163, 164 and 165) contain the exceptions to that general rule. The present case falls within none of those exceptions.

But we are free to admit that the Supreme Court, in the case of *Henning v. Steamer St. Helena*, 5 An. R. 349, has extended the exceptions found in the Code, to the enforcement of special privileges wherever the movable property subject to such privileges might be found, although beyond the territorial limits of the parish of the debtor's domicile. And in that case, the court overruled the case of *Hollander v. Nicholas*, 3 Rob. Rep. p. 7, in which the contrary doctrine had been maintained. But your honors will observe the reasons given by Judge Slidell, the organ of the court :

"There is much plausibility in the argument that defendants, so far as their personal liability is concerned, are entitled to the benefit of the general rule; and the tendency of our jurisprudence has been to protect, with strictness, the right of the citizen in this particular. *Richard v. Kimball*, 5 R. R. 142. But in our opinion the question whether plaintiff shall be permitted to enforce his privilege in any other forum than that of the owner's domicile, stands upon a very different footing." * * *

* * * * * "Undoubtedly, the privilege is an accessory to the principal obligation; but it does not follow that the remedy *in rem* and the remedy *in personam* are inseparable. The mortgage creditor may seize and sell the land without resorting to the personal liability. So the pledgee may proceed to have the thing judicially sold, without cumulating a prayer for personal judgment. And in the absence of any prohibition in the Code of Practice, we see nothing unreasonable in disconnecting the enforcement of the privilege from the personal pursuit, where it is impossible to pursue both together. Where there is a right there should be a remedy; it would be a mockery to acknowledge the right, and yet send a creditor to another forum, where the enforcement of the right would be impracticable."

The principle consecrated in this decision has been recognized and reaffirmed in the cases of *Blanchard v. Davidson*, 7 An. 654; *Heirs of Lalarue v. Woods*, 8 An. 366; *Thorn & McGrath v. Tyson*, 9 An. 231; *Gails v. Schooner Osceola*, 14 An. 54. But in all of these cases the distinction between the remedy *in personam* and the remedy *in rem*, commented above by Judge Slidell, is carefully preserved. Indeed, your honors may observe, that all of those cases, with the single exception of the last, were decided by Judge Slidell. We cannot doubt, that the true construction to be put upon those cases, restricts the right of the plaintiff to an

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enforcement of his privilege, and does not extend it to a personal judgment against the debtor, outside of the parish of the debtor's domicile. To give these decisions the latter effect, would be to annul the Article 162 of the Code; than which it is clear nothing was further from the intention of the court.

But in the present case, there is a personal judgment, with a vendor's privilege upon certain effects.

We submit that the judgment should have been purely and simply a judgment *in rem*; and that it is should be reversed by maintaining the declinatory exception as regards the remedy *in personam* sought by plaintiffs.

JONES, J. This suit, as originally instituted, was by the plaintiffs against the defendant, to recover a personal judgment and to enforce the vendor's privilege by writ of sequestration. The defendant pleads that his domicile was in the parish of Jefferson, where these proceedings *in rem* and *in personam*, and this suit should have been instituted. The court overruled this exception, and rendered judgment against defendant on the merits, with privilege on the property sequestered, from which judgment defendant appealed. In this court the defendant contends that the judgment of the lower court should have been purely and solely a judgment *in rem*, and that it should be reversed by maintaining the declinatory exception as regards the remedy *in personam* sought by plaintiffs. In this view of the law we concur. 8 An. 367.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be so amended as to restrict the operation of said judgment to the property sequestered, reserving to the plaintiffs their right to personal action against the defendant, at the parish of his domicile; that, in other respects, the judgment be affirmed; that the costs of the district court be paid by the defendant, and those of appeal be paid by plaintiffs and appellees.

ISLEY and HOWELL, J. J., absent.

D. B. NORTH v. T. P. LEATHERS.

Where there is not in the transcript of appeal either a final judgment, signed by the judge, or such interlocutory judgment as may work irreparable injury, the appeal will be dismissed at the costs of the appellant.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
L. Madison Day for plaintiff. *Roselius & Philips* for defendant and appellant.

LSLEY, J. The district judge granted an appeal to defendant.

There is not in the transcript of appeal, either a final judgment, signed by the judge, or such interlocutory judgment as may work irreparable injury.

From such judgments only does the law grant the right of appeal. See Code of Practice, Arts. 546, 565 and 566; 7 La. Rep. 513.

Appeal rejected and dismissed, at the cost of appellant.

HOWELL and JONES, J.J., absent.

CHARLES H. DAVIS v. HENRY C. MILLAUDON, Agent.

The reasoning and the opinion of a court upon a subject, on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by the decree of the court.

A tender, in open court, of the thing demanded is an admission that the thing itself is due, and is, therefore, inconsistent with the averment that the thing is not due; neither can defendant withdraw his tender subsequently, so as to affect any rights the plaintiff may have acquired under it.

The plea of payment is inconsistent with a general denial, consequently a plea of tender.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings, and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but, where such tender is made, *not of the thing claimed, but of something else*, with a special reservation (if not accepted) of all legal rights, and with the special defence that the thing claimed is not actually due, it has not that conclusive effect.

If one sells or alienates a piece of land, from one fixed boundary to another, the purchaser takes all the land between such bounds, although it gives him a greater quantity than his title calls for, and the surplus exceeds the twentieth part mentioned therein. Neither can there be increase or diminution on account of disagreement in measure.

A PPEAL from the District Court of St. Bernard, *Foulhouze, J.*
George S. Lacey for plaintiff and appellant.—Upon reading the brief by counsel for defendant and appellee, your honors will perceive that the grounds upon which they rely to maintain the judgment of the court *a quo*, are substantially as follows:

I. This honorable court erred in concluding that the tender of land was an admission that the thing itself is due.

II. That the plea of tender was rightfully withdrawn.

III. That the sale from defendant to plaintiff was one *per aversionem*, and therefore does not give rise to an action for a diminution of price.

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IV. That, if the sale was one *non per aversionem*, the action of diminution will not lie, because "the value of the deficiency in the land sold is not one-twentieth of the total price stipulated in the act of sale, for all the objects sold."

1. "This honorable court in concluding that the tender of land was an admission that the thing itself is due."

We have carefully read the brief of J. M. Ducros, Esq., which is solely directed to the solution of this point; but, we have to confess, that we find in the argument nothing calculated to inspire us with the belief that the position is well taken.

In his pleadings, the defendant alleged that, on the 19th of July, 1859, he purchased about two hundred and fifty acres of land, in the rear of that portion of the plantation which lies on the right bank of the bayou, and this he tendered to the plaintiff, to be considered as forming a parcel of his plantation, in lieu of the deficiency set up as a basis for recovery in diminution of price.

Your honors, in considering the legal effect of that plea, held "that the plea of tender was an admission of a deficiency in the quantity of land sold, and was inconsistent with the plea of the general issue."

In what respect was there error in the judgment of your honors? Could the court have held otherwise than it did? Was not the tender of land to supply a deficiency antagonistic to the idea of no deficiency? Is not an offer to pay an admission that the sum offered is due? Was not the offer, or tender to make good the deficiency, a legal admission that there was a deficiency, and that defendant was bound to make it good? And this, too, notwithstanding he declared "he did not intend to waive the benefit of the plea of the general issue." Can the offer be regarded as a gratuitous donation, when no one, by law, is easily presumed to donate? It seems to us a work of supererogation to attempt to strengthen the position which this honorable court has taken in relation to the plea of tender; and we think your honors will long hesitate before overruling the opinion expressed in 14 Annual, 869, and adopting a conclusion, not only opposite to that opinion, but at war with reason and precedent. Conceding, however, for the sake of argument, that the plea of tender in this case did not admit a deficiency in the quantity of land sold, and that this court fell into an error in thus interpreting that plea, the question arises, can that error now be corrected? We submit unto your honors that the effect of the plea of tender was directly presented for decision when this case was first brought up on appeal to this court; that it was then expressly decided; and the case was remanded to the lower court to be proceeded in upon the principles enunciated in that decision. The defendant did not think it necessary to apply for a rehearing; the only mode prescribed by law, in which to have corrected the error, if the court had fallen into error. Under such circumstances, the opinion of this court, in 14 Annual, relative to the legal effect of the plea of tender, has become a *res judicata*, and that question cannot now be inquired into between the parties to this cause. In another and a future case, the court may lay down a different doctrine; for, as to such case, the opinion in 14 Annual is but a precedent. It is otherwise, how-

ever, with reference to the cause now before the court: it is a thing adjudged.

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Would it not be strange did this court possess the power to determine certain questions at issue between litigants; remand the cause to be tried upon the view enunciated by the court; and after trial, and upon second appeal, to reverse the former opinion, and adopt a conclusion directly opposite to the first decree?

2. "The plea of tender was rightfully withdrawn."

Counsel for defendant, in their argument upon this point, have committed a two-fold error: one relating to the facts, the other to the law.

They say, on page 3 of their brief: "The revocation was made under an order of court, which permitted the filing of the supplemental and amended answer, by which the withdrawal of the tender was made, and must, therefore, be considered as having been made with the assent or approbation of the judge *a quo*. Again, said withdrawal was effected without any objection or opposition from the plaintiff, who is, consequently, presumed to have acquiesced in it."

In reply to this assertion on the part of defendant's counsel, we repeat the language of our original brief: "The withdrawal was an *ex parte* proceeding; was in no way brought to the notice of plaintiff's counsel, except by filing the record, and was not concurred in by him; nor was it allowed by the court."

It is contended by counsel for Millaudon, that the tender of land was not accepted by plaintiff; that, until an acceptance was manifested, a judicial contract was not formed; and, therefore, the plaintiff possessed the right to retract and withdraw such tender. Decisions of the Court of Cassation and other French authorities are cited for the purpose of sustaining this position.

We do not understand these authorities as covering a judicial admission made under the circumstances connected with the plea of tender filed in this case; nor do we think the French law can possibly go so far as to declare that a plea of payment or tender is ineffectual against the party thus pleading, until his adversary manifests an acceptance thereof. Be this as it may, the rule which prevails under the jurisprudence of Louisiana is declared in Art. 2270, C. C.: "The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding. It amounts to full proof against him who has made it. It cannot be revoked, unless it be proved to have been made through an error in fact. It cannot be revoked on a pretence of error in law." Art. 2264, C. C., No. 4; 6 An. 719.

Under Article 2270, no acceptance is requisite. A judicial confession once made, constitutes *per se*, not merely a presumption, but amounts to full proof against him who has made it, and cannot be revoked, unless proved to have been made through an error in fact.

3. "The sale from defendant to plaintiff was one *per aversionem*, and therefore does not give rise to an action for a diminution of price."

The characteristics of the act of sale in question were laid before your honors upon the first appeal, for the purpose of obtaining a decision from the court, whether the sale was one *per aversionem*, or not. This court

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held that it was not a sale *per aversionem*, and remanded the cause to enable the plaintiff to establish his demand in diminution, based upon the deficiency of land. The judgment of your honors upon the question *per aversionem*, like your opinion upon the plea of tender, forms *res judicata*; and the character of the act of sale in controversy is no longer open to inquiry. If, however, the court takes upon itself to investigate the nature of the present sale, then, in order to show that it is not one *per aversionem*, we refer to our brief filed upon the first appeal.

4. "If the sale was not one *per aversionem*, the action of diminution will not lie, because the value of the deficiency in the land sold is not one-twentieth of the total price stipulated in the act of sale, for all the objects sold."

We deem it unnecessary to take issue with counsel for Millaudon upon the question of law presented on page 5 of their brief. We may admit that the action for diminution of price, on account of a deficiency in the land sold, will not lie, unless the value of such deficiency equals one-twentieth of the total price stipulated in the acts of sale, for all the objects sold; or, we may assert, that the action *quanti minoris* will lie, wherever there is a deficiency of one-twentieth in the land sold, regardless of the sum given for the totality. In both views, plaintiff's action is fully made out by the evidence. If, as we have supposed in our original brief, the latter be the correct principle, then this action is established by the act of sale showing 1,520 acres sold, and the report of the surveyor fixing the deficiency at 193 acres; 193 is more than one-twentieth of 1,520. If, on the contrary, the rule of law has been properly expounded by counsel for defendant, and the view first above taken governs, then this demand is sustained by the act of sale, showing \$125,000, the price for the totality of property sold, and the testimony and pleadings in this case, fixing the value of the deficiency from \$10,000 to \$16,000. 10,000 is more than one-twentieth of 125,000.

There is a wide difference in the value of the deficient land, as calculated by the counsel for the respective parties; but, in examining those calculations, your honors will at once perceive that counsel for plaintiff has presented that which should be adopted by the court.

Counsel for Millaudon have, unauthorizedly, located the deficiency in a particular part of the Davis plantation; isolated, as it were, from the rest of the place; regarded it as naked, and unimproved of itself, and deriving no value from the improvements of the plantation; and in this light has presented it for valuation. Counsel for Davis, however, gives no particular locality to the deficient land; regards it as making a part of a large sugar plantation; reflects upon it a proportionate degree of the improvements made upon the plantation as a whole; views it in the exact condition which it was supposed to have, at the time of the sale, and by an average estimate, with the price of the entire land, determines the proportionate value of the 193 acres of which there is a deficiency. He places the quality of the 193 acres upon an average basis; and, having thus fixed the character of the land, he arrives at its value by ascertaining the sum given per acre, at the time of the purchase by Davis, and mul-



tipling that amount by 193. This is, essentially, an average computation throughout; and, in cases of deficiency, that mode of ascertaining the damage sustained by the purchaser is the only one which can be adopted. Where there is an eviction, it might, perhaps, be otherwise. The land from which the party may be evicted can be examined; its condition, quality and value shown; and, under such circumstances, the relative instead of the average value of the evicted premises might be the true criterion whereby to measure the damages sustained. Not so, however, where diminution of price is claimed on the ground of deficiency in the land sold.

Chancellor Kent, in his Commentaries, p. 477, vol. 4, edition 1848, lays down the rule of computation in cases of eviction and deficiency, and in relation to the latter he says: "The measure of compensation for a deficiency in the quantity of land, in the case of a sale by the acre, unattended by special circumstances, has been assumed, in some cases, to be the average and not the relative value. But, in cases of eviction, justice evidently requires that the relative instead of the average value be taken as the rule of computation." Such, likewise, seems to be the view taken by your honors, in the opinion reported in 14 Annual, 869. The language of Mr. Justice Land is: "If a vendor has the right to tender other lands in satisfaction of a vendee's demand for a reduction of price, in consequence of a deficiency in the quantity of land sold, the tender should be of lands of the same quality and value as those actually conveyed, * * * And the same rule necessarily applies, when the deficiency is supplied otherwise than by a tender.

J. M. Ducros and Cyprien Dufour for defendant.—The nature of this suit is well stated by the appellant's counsel, as follows:

"This is an injunction suit, to arrest the execution of an order of seizure and sale, sued out for the collection of a mortgage note, given in part payment of the price of a plantation and slaves, purchased by the plaintiff from one Benjamin L. Millaudon. The ground upon which Davis now claims to maintain the injunction is a deficiency in the quantity of land sold, exceeding one-twentieth, and which, he avers, has diminished the value of the plantation in the the sum of, at least, \$16,000."

The answer of the defendant denies the right of the plaintiff to call upon him for a diminution of price, for various reasons. The principal reason is that the sale from the defendant to the plaintiff, being one from boundary to boundary, is a sale *per aversionem*, and therefore gives no right of action for a diminution of price.

Article 2471, C. C.: "There can be neither increase nor diminution of price, on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary."

The property sold is thus described in the act of sale, to wit: "A certain sugar plantation situated on the Bayou Terre aux Bœufs, in the said parish of St. Bernard, known by the name of Coiron's estate, at about three miles from the river Mississippi, said parcel or tract of land being and lying on both sides of the said Bayou aux Bœufs, and measuring 1,520 arpents, and being bounded on both sides of the said bayou, on the up-

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per line by land belonging to the heirs of Joseph Ramirez, and on the lower line by land belonging to the estate of Joseph Sanchez."

Such is the description given of the property sold, and the question arises: Is this not a sale from boundary to boundary? It is impossible to imagine a case more in point than the present one for the illustration of what is termed in our jurisprudence a sale *per aversionem*.

In *C. H. Davis v. Laurent Millaudon*, the same point being raised for the same object, the court was called upon to determine the nature of this sale, and the court held: "The sale from B. L. Millaudon to Davis is a sale *per aversionem*." 14 A. 808; *C. H. Davis v. Laurent Millaudon*.

This case, however, has been once already on appeal before this court, and is now presented to your honors for the second time; and the counsel for the appellant says, at page 5 of his additional brief: "The characteristics of the act of sale in question were laid before your honors upon the first appeal, for the purpose of obtaining a decision from the court, whether the sale was one *per aversionem*, or not. This court held that it was not a sale *per aversionem*, and remanded the cause to enable the plaintiff to establish his demand in diminution, based upon the deficiency of land. The judgment of your honors upon the question *per aversionem*, like your opinion upon the plea of tender, forms *res judicata*; and the character of the act of sale in controversy is no longer open to inquiry."

The counsel is clearly mistaken.

This court has not held, in the judgment referred to, that the sale was not one *per aversionem*.

The decision rendered upon the first appeal involved only matters incidental to the main issue; and the cause was remanded, not as the counsel says, "to enable the plaintiff to establish his demand in diminution, based upon the deficiency of land," but, in the very terms of the decree, "remanded to the lower court for further proceedings according to law." The record shows that, in the course of the first trial in the court below, the defendant filed a supplementary answer, in which, amongst other pleas, the following is to be found:

"That, though denying the right of the plaintiff to call upon him for a diminution of price, for the various reasons set forth in this and the original answer, yet, this respondent has purchased from the government, on the 19th day of July last, some two hundred and fifty acres of land, in the rear of that portion of the plantation which lies on the right bank of the bayou, which this respondent hereby tenders to said plaintiff, to be considered as forming a portion and parcel of his plantation."

A fundamental error is in confounding as identical the plea of payment and the plea of tender.

Payment is one of the modes by which obligations are extinguished. Art. 2126, C. C.

It is a cardinal rule that every payment pre-supposes a debt. Art. 2129, C. C.

It follows, of course, that whenever a plea of payment is entered it admits the pre-existence of the debt which it assumes to have extinguished.

Hence, the Supreme Court has invariably held that the plea of payment is a peremptory exception; it is a plea going to extinguish the action. It

must therefore be pleaded specially, and of course it assumes the pre-existence of the claim, because a thing that was not could not have been extinguished. 6 L. 457, *Gleises v. Faurie*. DAVIS
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A tender, on the contrary, is a totally different plea. It is surely an admission of something, but a material inquiry arises as to the essence of the offer, in order to ascertain what is admitted. If it be an unconditional tender of the thing demanded, it is at once an admission of the right and a satisfaction of the claim of the other party. But if it is made without prejudice, in a manner showing the party is willing to submit to a sacrifice and to make a concession, the circumstance of such an admission cannot be disconnected from it. It is a most lamentable mistake to say that an admission, thus made, is inconsistent with a plea that the thing demanded is not due. The declarations and qualifications accompanying the tender, on the contrary, are most essential to give it its true character.

"The judicial confession is the declaration which the party makes in a judicial proceeding. It cannot be divided against him." Article 2270, C. C.

"A distinction is taken between the admission of particular facts and an offer of a sum of money to buy peace. For, as Lord Mansfield observed, it must be permitted to men to buy their peace without prejudice to them, if the offer should not succeed; and such offers are made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant, being sued for £100, should offer the plaintiff £20, this is not admissible in evidence, for it is irrelevant to the issue; it neither admits nor ascertains any debt; and is no more than saying he would give £20 to be rid of the action." 1 Greenleaf, § 192.

In a case where an offer to pay a portion of the debt was urged as an answer to the interruption of prescription, this court said :

"We consider the conversation, taken as a whole, as a proposition by the defendant to buy his peace, as an offer of partial payment, upon condition that the note should be given up to him, which proposition was declined, and so the position of the parties remained unchanged." 9 A. 17, *Lackey v. MacMurdo*.

LSLEY, J. This is an injunction suit, sued by Charles H. Davis, out of the Second Judicial District Court of the parish of St. Bernard, to stay proceedings *via executiva*, which B. L. Millaudon was carrying on in the same court, for the collection of a mortgage note, given by Davis in part payment of the price of the *Coiron Estate*, which is described in the act of sale from B. L. Millaudon to C. L. Davis, as follows: "A certain sugar plantation known by the name of *Coiron's Estate*, at about three miles from the river Mississippi, said parcel or tract of land being and lying on both sides of the said Bayou aux Bœufs, and measuring fifteen hundred and twenty arpents, and being bounded on both sides of the said bayou, on the upper line by land belonging to the estate of Joseph Ramirez, and on the lower line by land belonging to the heirs of Joseph Sanchez"; besides other property on and thereunto attached, the price of the whole property in block being a fixed one.

This is the second time that this case is presented to the Supreme

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Court for its decision (see 14 An. 868); and as great reliance is placed by Davis on the enunciation by the late Supreme Court, of certain principles, as final on the particular points passed on, and as having on those points the force and effect of *res judicata*, it becomes necessary to determine now, whether this position be a tenable one.

On examining the decretal part of the judgment on the first appeal, we find that it merely avoids and reverses the judgment of the lower court, and remands the case for further proceedings, according to law.

In *Pepper v. Dunlap*, 5 An. 200, it was held "that the reasoning and the opinion of a court, upon a subject on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by the decree of the court." And *Thompson v. Mylne*, 4 A. 206, is upon the same point and to the same effect.

Marcadé. vol. 5, p. 386, says:

"Quant au point de savoir quand il y a *res judicata*, il est assurément bien simple, quoique controversé. La raison, d'accord avec les textes et l'autorité de Pothier, dit assez que des là qu'un jugement est prononcé, des là que le point litigieux est judiciairement décidé, il y a *res judicata*. Il est clair, au surplus, que la chose jugée n'existe jamais que dans le *dispositif* du jugement, non dans ses motifs (qui ne pourraient être consultés à cet égard que pour expliquer le sens d'un *dispositif* obscur); et seulement dans les parties de ce *dispositif* qui méritent vraiment ce nom parcequ'elles tranchent la contestation, et non dans celles qui ne présenteraient que des énonciations."

* See also *Jackson v. Tiernan*, 15 La. 485; *Josephine v. Lee*, 6 Wheaton, 109.

This court has, therefore, no hesitation in saying that all the matters presented to it in this case, whether arising out of the pleadings or the evidence adduced, remain under its entire control, unshackled by any previous action thereon, when it was examined on the first appeal. The opinions and *obiter dicta* of our predecessors, particularly in suits which have once been submitted to them, and are again before this court for revision, are entitled to and will always receive due consideration; but, as the late court retained supervisory power over all the questions involved, so will this court exercise the same power, discreetly, if the ends of justice can be thereby subserved.

The first question, then, is, as to the legal effect of the tender by Millaudon of other lands, to supply the deficiency in the tract sold by him to Davis; and on this point we are constrained to differ from the late court, which, however, only passed on it incidentally, in connection with a motion for a continuance, which had been overruled in the District court. The court, *arguendo*, on this point held, "that the plea of tender was an admission of the deficiency in the quantity of the land sold, and was inconsistent with the plea of the general issue, and this inconsistency was not avoided by the defendant's declaration that he did not intend to waive the benefit of the latter plea.

A tender in open court of the thing demanded, or its equivalent, is certainly an admission that the thing itself is due, and is, consequently, inconsistent with an averment that the thing is not due. It has ever been

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held that the plea of payment is inconsistent with a general denial; and a plea of tender cannot be less so.

After the rendition of the judgment remanding the case, Millaudon, by an *ex parte* proceeding, withdrew his tender, (which he could not do to affect any right Davis might have acquired under it,) but which he does not urge. See *Boatner v. Scott*, 1 Rob. 546; *Kohn v. Marsh*, 3 R. 48.

We will, therefore, proceed to examine the very important question, whether the qualified tender of *other lands*, with a concurrent reservation of all legal rights, and the special plea that he, Millaudon, was not legally liable for the deficiency, because the sale to Davis was one *per aversionem*, precluded him from availing himself afterwards of that defence.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but, when such tender is made, *not of the thing claimed, but of something else*, with a special reservation (if the tender is not accepted as made), of all legal rights, and with the special defence that the thing actually claimed is not due, we cannot give to a tender so made the conclusive effect claimed for it by Davis. It was virtually an offer on the part of Millaudon to buy his peace, and to put a stop to litigation. If it amounted to anything at all, as an admission, it did not go to the extent that the thing claimed was due; but simply admitted that there was a deficiency in the measurement of the land sold, but it did not preclude the party from using the defence on which he relied, if his specific offer was not accepted. See *Hough v. Vickers*, 6 A. 724; Paillet, *Manuel de Droit*, note 17 to Art. 1356 N. C.; Merlin, *verbo* Confession, § 3; Brunoman, *ad* l. 28.

The main question is now reached, whether the sale from B. L. Millaudon to Davis was, or was not, one *per aversionem*. The description in the notarial act of sale is the *Coiron Estate*, lying on both sides of the bayou Terre aux Bœuf, between the plantations of José Ramirez and that of the heirs of Sanchez. The length of the lines fronting on the bayou is not given, but the superficial area of the property, amounting to fifteen hundred and twenty-five arpents, is expressed.

The circumstance that gives rise to the controversy now under consideration is, that in the description of the property sold, no rear boundary is defined; but that is an incident so common in the sale of lands lying on the rivers and bayous of this State, the primordial titles to which extend to the ordinary depth of forty arpents, that when in sales or other transfers of lands, so situated, no mention is made of the depth, that depth is always presumed.

It was so held in *Carraby v. Desmare*, 7 N. S. 664, by Judge Martin, (than whom no one was better acquainted, from long practical experience, with the mode in which rural property so situated was usually described), and he therein says: "In sales of lands on the Mississippi, the tract is sometimes described by the extent of its front and the names of the owners of the tracts above and below. Nothing is said of the owner of the tract in the rear, because, generally, the tract extends to another stream, or to an uncultivated swamp. In such a sale, the ordinary depth of forty arpents is presumed as that which the vendor pos-

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assessed, unless the contrary is shown. The question is one of intention as to depth, in the solution of which the court is aided by the situation of the land and the price, etc." The length of the front lines of the Coiron estate was not mentioned in the act of sale; but it can hardly be doubted that, in the sale of such a property, the vendee could have been ignorant of it; and the area being set forth, the depth of the tract could be readily ascertained. Had the lateral lines run parallel to each other on both sides of the bayou, there could have been no deficiency at all. The difficulty is caused by the converging eastern boundary line on the north side of the bayou; but, as Davis bought the land with special reference to that boundary, he must be presumed to have known in what direction it ran. There is, probably, no subject which has given cause more frequently for judicial investigation than that arising under Articles 2471 and 850 of the Civil Code. Our Reports teem with examples as to what do and what do not constitute sales *per aversionem*; and it is therefore not difficult to determine whether the sale of the Coiron estate belongs to that class or not. Among the numerous cases to which our attention has been directed, and which have otherwise fallen under our observation, there are some very similar, if not analogous, in their main features, to that of the Coiron estate; and they were all deemed sales *per aversionem*.

We give below the descriptions contained in the sales, extracted in each of the following cases:

1. In *Brazzale & Sewell v. Bordelon*, 16 La. Rep. 335, as follows:

"A certain tract or parcel of land on which the said Perot and wife reside, situate in the parish of Natchitoches, on both sides of the Red river, containing about two hundred and twenty arpents, bounded above, on both sides of the river, by lands of the purchasers, and below, on the left (of the bayou), by lands belonging to them, and on the right (of the bayou) by land of Antoine Lenoid."

In *Préjean v. Giron et al.*, 19 La. p. 423, as follows:

"One tract of land lying situate in the parish of St. Martin, at Cote Gelee, containing four arpents in front, with the depth that may be about thirty-five or forty arpents, the *front* of the said tract beginning at the extremity of the land of Pierre Giroir, bounded on the one side by the lands of Baptiste Comeaux, and on the other side by the lands of Madam Clark Beaton."

In *Saulet v. Trépagnier*, 2 Rob. 358, as follows:

"Ce qui compose bien l'habitation mentionnée aux présentes, de dix-sept arpents de face au fleuve, sur une profondeur, qui sera déterminée par les titres ce qui agréé à l'acquéreur, bornée dans sa partie supérieure par l'habitation Dieudonné, et dans sa partie inférieure par celle de Mme. Veuve Delhommer."

In *Nicholes v. Adams*, 9 A. 117, as follows:

"A tract of land situate in this parish (Pointe Coupée), at a place called 'Village,' where the said vendor now resides, containing twenty-six arpents front, and bounded *above* by land of Elijah Adams, and *below* by land of Marcelin, f. m. c., with a special reservation of four superficial arpents from the upper line, which four acres have been sold by the present vendor to O. F. Hornsby; the tract, object of this sale, containing, after the above reservation, eight hundred and fifty superficial arpents,

more or less. This land fronts on the Mississippi river, as appears by titles referred to."

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In no one of the cases cited is there any reference whatever to a rear boundary.

Wherever, as in many of the cases referred to, the tracts sold are of triangular form, with front and lateral boundaries described, or when, as principally in the sale of town lots, all the boundaries are described, they necessarily fall within the class of sales termed *per aversionem*.

But it will be seen that, in almost every case which were pronounced not sales *per aversionem*, no boundary whatever, or only one, was given.

It was so in *Lacour v. Watson*, 12 A. 215; *Fisk v. Flemming*, 15 La. 205; *Hall v. Nevil*, 3 A. 327; *Boyce v. Cage*, 7 A. 673; and they were necessarily excluded from that class of sales.

The sale of the Coiron estate was that of a specific thing, for a whole price in block; and, as it was held in *Jackson v. Barringer*, 15 John. Rep. 353, Davis "must be presumed to have known what land was contained in the expressed boundaries."

The identical question, as to the character of this sale, has been already solved by the late Supreme Court, in the case of *Laurent Millaudon v. Chas. H. Davis*, in 14 A. p. 808. In that case Davis sets up the defence of *quantum minoris* against L. Millaudon, who was prosecuting his claim, on a mortgage note, bearing on the Coiron estate, the payment of which Davis had assumed, as a part of the price of that property.

From what precedes, and in view of what we deem a fair legal construction of Articles 2471 and 850, C. C., enacted, in all probability, with a special view to the peculiar topography of the country, we conclude that the sale of the Coiron estate was one *per aversionem*.

Our attention has been called to several bills of exception, spread upon the record; but, as they all relate to the claim of Davis for a diminution of price, which we do not sustain, we do not deem it necessary to pass on them.

The judgment of the District Court must be, therefore, affirmed.

It is ordered, adjudged and decreed, that the judgment of the lower court be affirmed, at the costs of the appellant.

PIERCE CAREY v. A. B. COURCELLE, et als.

Where sub-contractors deliver defective work to the contractor, who receives it in that condition, and it causes damage to another, they will all be held liable *in solido* for the amount of the damage so caused.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor for plaintiff. *Roselius & Philips* for Bennett & Lurges.

J. L. Tissot and Filleul for Courcelle.—The defendant, Courcelle, undertook to build a verandah to a house situated on Marais street, between Customhouse and Bienville. He gave the contract for furnishing the iron work to Bennett & Lurges, and the contract for slating to J. B. Brown, who employed the plaintiff as a slater. It is alleged that, on account of a defect in the iron work furnished by Bennet & Lurges, the verandah fell out suddenly from the house to the ground, precipitating with it the plaintiff, injuring him severely. The plaintiff claims \$10,000 damages from Courcelle and Bennett & Lurges, *in solido*.

The case was tried by a jury, who rendered a verdict in favor of plaintiff for \$1,000. The defendants have appealed from the judgment of the District court.

1. The relation of master and servant did not exist between Courcelle and Bennett & Lurges and Brown, and he cannot be made liable for the acts of Bennett & Lurges, according to Articles 2296 and 2299, C. C.

Courcelle, Bennett & Lurges and Brown exercised independent employments; they executed different and independent contracts; and, supposing any injury was caused by Bennett & Lurges and their servants, Courcelle is not liable for their acts.

When he who does the injury, either in person or by his servant, exercises an inependant employment, the party employing him is clearly not liable, as in the instance of a butcher who employs a drover, whose deputy does the mischief by his careless driving, or of a builder who contracts to make certain alterations in a club house, together with the necessary gas-fittings, and who employs a gas-fitter for the latter purpose, under a sub-contract, through the negligence of whom or of whose servants the plaintiff sustains an injury; in these cases the relation of master and servant does not exist between the principal and the person who occasions the injury, and the former is therefore not liable for the misconduct of the latter. Broom's Legal Maxims, No. 672, on the maxim, "Respondeat Superior;" Paley's Agency, p. 296 and notes; Story on Agency, No. 453; *Peyton v. Richards*, 11 A. R. 62.

2. If the relation of agent and principal, or servant and master, exists between Courcelle and Bennett & Lurges and their workmen, it also exists between Courcelle and Brown and his workmen, and Courcelle, as master, is not liable to one servant for damages resulting from the negli-

gence of another servant. Art. 2299, C. C., does not apply to such a case.

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The principle is that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, wherever he is acting in discharge of his duty as servant of him who is the common master of both. *Hubgh v. N. O. & Carrollton R. R. Co.*, 6 A. R. 497; Paley on Agency, 453 and notes; Kent's Commentaries, vol. 2, p. 296; Story on Agency, 453 and notes; *Howes v. Steamboat Red Chief*, 15 A. R. 321.

LABAUVE, J. The plaintiff states, in substance, that the defendants, Courcelle and Bennett & Lurges, are indebted to him *in solido* in the sum of \$10,000, for which he prays judgment; that he is a laboring man and a slater by occupation, and was employed in that capacity by Brown, to work on the verandah of a house in this city; that said Courcelle was the undertaker to put up the building for the owner, and that Bennett & Lurges were employed by him, the said Courcelle, to put up the said verandah, which was to be with iron bars projecting from the walls of the house, which iron bars were to be well fastened to the walls; and that said Bennett & Lurges constructed the said verandah so negligently that it was unsafe, and that when he went on top, to slate it, the whole entire work fell out suddenly from the house to the ground, precipitating petitioner with it; that petitioner was shockingly wounded and injured; that his leg was broken in two places, etc.

The defendants answered by a general denial.

The jury having found a verdict for plaintiff, against the defendants *in solido*, for \$1,000, the court, being satisfied therewith, refused a new trial and gave judgment accordingly. The defendants appealed.

On the trial below Bennett & Lurges requested the court to charge the jury, "that Bennett & Lurges, being under the supervision and control of A. B. Courcelle, they were bound to follow the instructions given to them by said Courcelle." The court refused to give the charge as requested, and a bill of exceptions was taken to the opinion of the court. We think the court did not err. The charge was calculated to mislead the jury; the cause of action arose from a quasi-offence, and the subcontractors, Bennett & Lurges, were not justifiable, although under instructions, in doing the work in such a defective manner as to endanger the safety of other workmen that were to follow them in the completion of the verandah; they were responsible for their work.

A. B. Courcelle was the undertaker to put up the building; he gave the contract for furnishing and putting up the iron work of the verandah to his co-defendants, Bennett & Lurges, and the contract for the slating he gave to T. B. Brown, who engaged the plaintiff as a slater to do the work. The evidence shows that the iron bars of the verandah were not securely fixed on the house; and when the plaintiff, with other workmen, went on the verandah to slate it, the whole work fell out suddenly from the house to the ground, precipitating and injuring the plaintiff. The injury consisted in a comminuted or double fracture of the right thigh bone, besides a fracture of the two bones of inferior portion of the right

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leg, also a dislocation and fracture of the left foot, and fracture of the two inferior bones.

The plaintiff avers, in substance, that the said Courcelle, the undertaker, was well advised that the said verandah was unsafe and had been negligently constructed by the said Bennett & Lurges, and that he received the work in its dangerous condition, thereby making himself liable with the others. The testimony shows that Courcelle was present when the bars of iron were fixed to the building, and, in fact, participated in the unsafe manner of fixing the iron bars to the house. *Leon Cariday*, a witness, says: "These iron bars merely went through the wall and extended on the roof, and were only wedged on both sides with wooden wedges, and not attached to any joint at all; and the front walls of the house extended up higher than the roof of the balcony, by the entire cornice of wall; and, besides the wooden wedges, there was nothing else to hold the upper iron bars into the walls. I made the observation of the fact to Mr. Courcelle, now in court."

We are of the opinion that Courcelle, having contributed to the insecure manner of putting up the verandah, and having afterwards received the same in its bad and dangerous condition, made it his own work, and became liable with his co-defendants for the injuries sustained by plaintiff. This case comes clearly within the dispositions of Arts. 2294, 2295 of C. C. The case that comes nearer to the one at bar is *Peyton v. Richards*, where the facts are thus stated: "John McVitter was the undertaker of the building; McVitter made a special contract with Newton Richards to put up the iron front in question, of which McVitter furnished the materials; and Richards made another special contract with William Thompson to do the same work. William Thompson himself performed the work, with the assistance of laborers, hired and paid by himself. Just as the work was completed, the iron work and plates, or intablures, fell to the ground, in consequence, as witness thinks, of not being sufficiently propped with pieces of wood under the horizontal pieces, as is usual and necessary. Thompson himself and another workman fell to the ground with the work. After this accident, which caused the death of plaintiff's slave, Thompson erected the work anew, and only received the stipulated compensation from defendant (\$15) after the work was properly done and finished. We are of the opinion that Thompson, by whose fault, negligence or unskillfulness, this accident happened, was not the *servant* or *overseer* of defendant in the performance of this work."

The difference between that case and the one at bar is this: in that case Thompson had not completed and delivered his work to his employer, Newton Richards, and the workmen of Thompson had no right to look to Richards for any damages suffered by them in consequence of the fault or negligence of their employer; but, in the present case, Bennett & Lurges, sub-contractors had completed their work in an unskillful and neglectful manner, and delivered the same in that condition to Courcelle, the undertaker; this work was a part of the contract of Courcelle with the owner of the building; and he, Courcelle, by receiving it in that unsafe and insecure condition, became liable for the damages suffered by plaintiff. The receiving of the work by Courcelle did not relieve Bennett &

Larges of their responsibility towards those who were to complete the verandah by slating it. We think that the principles settled in the case of *Clement Camp v. Church Wardens & Kirwan*, 7 A. 321, support our views expressed herein.

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It is therefore adjudged and decreed that the judgment of the District Court be affirmed, with costs.

HOWELL, J., recused.

JONES, J. absent.

TIMOTHY CONNELL v. J. H. BROWN.

Where the record does not show a transfer of a right to the plaintiff, the case will be remanded.

APPEAL from the Second District Court of New Orleans, *Morgan, J. Buchanan & Gilmore* for plaintiff. *Whittaker & Fellowes* for defendant and appellant.

HYMAN, C. J. Defendant has appealed from a judgment rendered against him in favor of plaintiff.

Plaintiff sued defendant for \$427 22, on an account, for work done by E. D. White, in front of defendant's real property.

He alleged that the claim was due to White, and that White had assigned it to him.

Defendant, in answer, first denied all the allegations of the plaintiff, and then made the following admission: "Admitted that E. D. White performed the work set forth in his claim; that he, defendant, is entitled to deduction of \$93 82 on the bill of said White, for work done; this amount, therefore, we plead in compensation and reconvention."

This answer is an admission that the claim sued on was owing to White, but it is not an admission that plaintiff had any right or title thereto.

We have carefully examined the transcript for some evidence of transfer from White to plaintiff, and none has been found.

Plaintiff has not yet proved that he is the transferee of White, or that he has any right to the claim sued on.

The judgment of the lower court is reversed, and it is decreed that this cause be remanded to the District court for further proceedings therein. The plaintiff is to pay the cost of this appeal.

HOWELL and JONES, J. J., absent.

PIERRE DIVERGES v. HIS CREDITORS.

Where, in complicated accounts between the syndic and the creditors, the court *a quo* appointed an umpire to decide, and an accountant to investigate the accounts, the judgment will be affirmed.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. Roselius & Philips* for St. Romes, provisional syndic and appellant. *L. Castera* for B. Soulie, syndic.

HOWELL, J. This is a contest for the syndicship of the creditors of the insolvent, which involves the correctness of the accounts between said insolvent, as agent, and his principal, Mrs. de St. Romes.

Two auditors were appointed in the court below, whose reports are in the record, and in which they agree, except as to one item against, and two in favor, of the insolvent. Taking this result, as to the agreement in the debit and credit sides of the account as correct, it is unnecessary to enquire into the correctness of the three disputed items; for if they are all three decided in favor of the appellant, it does not affect the judgment rendered by the District court. An umpire was appointed by the lower court, and this court has referred the record to a competent accountant, and the result of the investigation of both is to sustain the judgment. The examination which we have been able to make of the record does not lead us to any different conclusion.

It seems that Mrs. de St. Romes voted upon the sum of all the charges against her agent, without giving him the benefit of the credits to which her auditor considers him entitled, and which the evidence, so far as this controversy is concerned, does not disprove.

Under these circumstances, and considering that this proceeding is not conclusive upon the creditors, we do not feel authorized to disturb the judgment appealed from.

Judgment affirmed, with costs.

JONES, J., absent.

HENRY LEVY v. MRS. J. ROSE.

Where a married woman is separated from her husband in property, and doing business as a public merchant, she cannot plead that the draft accepted by her did not inure to her personal benefit.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
G. Schmidt for plaintiff. *V. F. & J. B. Cotton* for defendant and appellant.

JONES, J. The plaintiff sued Jenett Rose and others on a draft purporting to be drawn by the said Rose, through her husband, as her agent.

The evidence shows that the said Rose was a public merchant, separated in property from her husband, and that her husband had full power to borrow money on her account at the time the draft sued upon was executed.

Her defence is a failure of consideration and that the consideration of the draft did not inure to her personal benefit.

The proof in this case leads us to the conclusion that this defence is untenable. Her repeated confessions to different witnesses, made after the death of her husband, that she owed the plaintiffs money, and especially the precise amount represented in the draft sued upon, taken in connection with the fact that, at the execution of this draft, she was a public merchant, separated in estate from her husband, who was her duly authorized agent to borrow money for her, render it certain that the draft in suit inured to her use and benefit.

Judgment affirmed, with costs.

HOWELL, J., recused.

CLEMENT BROWN v. HIS CREDITORS, AND NORTH, SMEDES & Co. v. BROWN AND WIFE.

The judgment of separation of property is valid, although the wife fails to prove, when attacked by the creditors of the husband, that he was indebted to her for the full amount for which she obtained judgment against him. The creditor can then only contest the amount of her judgment. A creditor placed upon the *bilan* for more than is due to him, is not a fraudulent act of the debtor; particularly if not so charged in opposition.

A PPEAL from the Third Judicial District Court of Jefferson, *Burthe, J.*
Whittaker & Fellows for Brown and wife. *R. K. Cutler* and *Messrs. Cotton* for intervenors.

L. Castera for *North, et als.*—Our Code, Article 1915, says that, in cases, however, of contracts, which purport to transfer immovable property,

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The 13 Annual Reports, in the case of *A. Giraud et als. v. Masier*, speaking of the dispositions of the above Article, says :

"But the law on this subject has been changed by the act of 1856; the 22d and 24th secs. of that act p. 436; R.S. pp. 256 and 257, are copied from the 11th and 13th sections of the acts of 1840; (Bullard & Curry's Dig.) pp. 474 and 475, authorize in express terms the institution of a suit like this by an individual creditor after the cession of property. See § 21, p. 435 of acts 1855 and p. 256 of Philip's Revised Statutes; and upon this point a radical change of legislation must be specially noticed; the change is found in section 21 of the acts of 1855, which is identical with the 10th section of the act of 1840; B. C. Dig. *loco citato*, with the exception that the act of 1840 applies to debtors who have voluntarily surrendered their property, while the act of 1855 applies to all debtors who have surrendered their property."

The case reported in 3 La. 461 and 4 An. 365, being decisions rendered previous to the act of 1855, are therefore no longer to be considered as authorities upon this point of practice.

As your honors will perceive, any creditor of an insolvent who has made a surrender, may, in his own name and for his own use and benefit, institute a revocatory action, to obtain the nullity and avoidance of any act passed at any time by his debtor with the view of defrauding creditors. This action can be resorted to even when the creditor has acquired *bona fide* immediate rights by contract with his debtor, and plaintiff in the action has a right to stand in judgment.

Now the plea of prescription is still less tenable.

There is a distinction to be made between a revocatory action brought by a party to a contract, and one instituted by a third person not a party to the contract. In the first case, the action is to be brought within a year from the date of the contract; in the second instance the action may be instituted within a year from the appointment of a syndic. C. C. Art. 1989; 4 L. R. 257. *Brown, syndic, v. Fergusson*, and especially p. 259, in fine, and p. 260; 11, L. R. 419, 424, *Fenesty v. Gousoulin*; 13 L. R. 126, *Hiriart v. Koger*.

In the decision last cited, the plaintiff Hiriart had obtained judgment in October, 1835. Roger, the defendant and debtor, had conveyed some property to his wife in October, 1828, and the sale was annulled as being tainted with fraud. 1 An. 132, *Cammack et als. v. Watson, et als.* See same vol. p. 262; *Wright v. Chamblis, et als.* 2 An, 451; *Nimo v. Allen*, same vol. p. 483; *Demstown v. Nut, et als.*

The issue was not changed by the supplemental petitions, because in matters of insolvency all the property of the debtor passes to his creditors by the surrender, whether the property be included in the schedule or not. 11 L. R. 521; *Muse, syndic, v. Yarbrough, et al.*

The only thing which the appellants could have complained of was that, in the original charge of fraud, the property in Arkansas, and the slaves which Clement Brown had concealed from and placed out of the reach of his creditors, were not specified and named; but even this seeming neglect can not be claimed of, because, the appellees only dis-

covered the facts disclosed in their supplemental charge of fraud during the course of the first trial of this cause. Besides, as Brown had made no mention in his schedule of the property charged to have been concealed or disposed of by him, the creditors could not reasonably be expected to make any disclosures or representations as to the situation or specific quality and nature of said property, but could only allege that Brown had not made a true and faithful statement of his affairs, and charge him, as they did, with having passed simulated deeds, and upon this point your appellees are of opinion that they have complied with the law. Acts 1855, sections 20 and 21. Acts 1808, §§ 16, 17; 4 L. R. 55, *Montesquieu v. Hill*; *Ib.* 200, *Coque v. His Creditors*.

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Now let us come to the revocatory action, praying for the nullity of the judgment of separation of property, on the ground that said judgment had been fraudulently obtained.

The general principle of our law is that when a judgment has been obtained by the wife against the husband, and when fraud is alleged in the premises, the burden of proof is thrown on the wife. 4 L. R. 422, *Deblanc v. Deblanc*. 1 An. 42, *Lefebvre, syndic, v. Montilly*.

What are the allegations of Evelina Anderson?

That she married her husband in the State of Maryland, in 1836; that she inherited from her father's estate a sum of \$5,000, in September, 1836; and \$500 from the estate of her mother, in 1836; and in the same year, from her aunt, \$500; and in 1850, from another aunt, \$271 65; in all, \$6,271 65; which various sums were received by her husband.

These pretended sums of money were received in Virginia, a State where the common law prevails.

In Grattan's Virginia Reports, vol. 8, p. 149, in the case of *Lewis et al v. Caperton et al.*, the court decided that a post nuptial settlement made by the husband on his wife, of personal property derived from her father's estate, not having been properly recorded, is void as against the creditors of the husband.

In the same Reports, vol. 2, p. 98, in the case of *Dold's Trustee v. Gorgen, Ec'r*, the court held that choses in action, and other property to which the wife is entitled during coverture, are liable to husband's creditors.

Every asset, therefore, of said Clement Brown was liable to his creditors; more especially because the evidence shows that when he received for his wife, not \$6,271 65, as alleged, but only a small amount of money decreed to her, he had not then intended to remove to Louisiana, and the legal conclusion is that Evelina Anderson, his wife, had not; and could not claim any privilege for her pretended rights. 11 L. R. p. 464, *Andrews v. His Creditors*. 4 An. 65, *Hayden v. Nutt et al.* 6 An. 703, *Martha A. Arnold v. McBride*. 10 An. 549, *L. C. Henderson v. D. B. Trousdale et al.* 14 An. 584, *J. Eager v. G. A. J. Brown and Wife*.

Let us now take another view of this case. According to our laws the wife may, during the marriage, apply for a separation of property, whenever her dowry is in danger, or when the disorder of the affairs of her husband induces her to believe that his estate may not be sufficient to meet her rights and claims. C. C. Art. 2399.

We have already seen that when a judgment of separation of property between husband and wife is attacked, to have it annulled on the ground

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of fraud, and when the husband is insolvent, the burden of proof is thrown on the wife. 4 L. R. 422, *Deblanc v. Deblanc*. 11 L. R. 534, *Bostwick v. Gasquet et al.*

She did not comply with any of the formalities prescribed by law to give life to her judgment.

By the Article 2403 of our Code, she was bound to publish the decree of separation within the three following months after rendition. There is no evidence, unless I am mistaken, of such a publication. In the record, then, said judgment is null and void. See 3 R. 328, *Harriett Marshall v. Michael Mullen*.

The judgment of separation is also null and void, according to the terms and provisions of Article 2402 of our Code, which says that the judgment is null and void if it has not been executed by the payment of the rights and claims of the wife, made to appear by an authentic act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment. See the last quoted case. 1 Rob. 431. *Electo Bostes v. John Walker*. 4 An. 513, *Longito v. Blackstone*.

LABAUVE, J. These two cases were consolidated and tried together below.

Madame Evelina Anderson brought a suit against her said husband, Brown, in December, 1852, alleging the disorder of his affairs, praying for a separation of property and for a judgment for money received by him. On the 10th January, 1853, she obtained a judgment against her said husband for \$6,271 65, with interest. Under that judgment she proceeded, by seizing and selling property, consisting in town lots and slaves, which were adjudicated to her at sheriff's sale, in July, 1853. Clement Brown was forced to a surrender of property, and which, being made, was accepted by the judge, May 15th, 1858. A number of creditors of the insolvent, Clement Brown, brought suits in June, 1858, to annul and set aside the judgment so obtained by said Evelina Anderson, and also to avoid the sale of property made to her by the sheriff under said judgment, and to have said property decreed to be liable for the debts of her said husband, Clement Brown, due said creditors.

The evidence shows that these complaining creditors became such three or four years after said Evelina Anderson had obtained her judgment and bought property under it at sheriff's sale. From an examination of the record, we are satisfied that said Evelina Anderson adduced *prima facie* evidence in support of her judgment, and that the suing creditors had nought to attack it. *Dinkgrave v. Norwood et al.*, 10 An. 564. *Landry v. Marchais*, 6 An. 89. *Duchard v. Rousseau*, 2 An. 174. *Sarah Ann Binford v. B. H. Thorn & Co.*, 15 An. 81.

We are of the opinion that the judgment rendered in favor of said Evelina Anderson against her husband, and the sale of property under it to her, are legal and valid.

We now come to the charge of fraud made against Clement Brown.

As we have come to the conclusion to remand this case, as regards Clement Brown, it becomes necessary, to facilitate the trial below, to pass on certain bills of exception, so far as Brown is concerned. Brown's counsel moved the court below to strike out from the record several sup-

plemental petitions of the complaining creditors, filed in 1860, on the ground, in substance, that they contained additional charge of fraud against the insolvent, and that they were too late; being filed long after the expiration of the ten days, etc. The court overruled the motion, and counsel of Brown took his bill of exceptions. We think the court did not err. This did not change the issue.

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The court charged the jury, in regard to Brown, that the putting down by the insolvent of a creditor, on his schedule, for a larger amount than was really due; as, for instance, the wife for a larger amount, was one of the kinds of frauds which were not specified in the acts relative to insolvents, but which is included in the words: *or any other fraud*. This charge was excepted to. We think the court erred. There was no allegation of that act in the oppositions; besides, it would not seem to be a fraud as contemplated by law. *Montilly v. Creditors*, 18 L. 383; *Slocumb v. Real Estate Bank*. 2 R. 92.

On trial below, the opponents and intervenors offered in evidence act of sale of property, 28th December, 1855, of C. Brown to H. C. Brown, and placed on the stand witnesses, *Robinson* and others, as to said transaction and others; to the introduction of this testimony, counsel for defendants objected, on the ground that no transaction, of a date more than a year prior to the transaction of Brown with complaining creditors, should be admitted in evidence. The court overruled the objections and received the testimony. We think the court did not err, as it was contended that this sale was a pure simulation.

The bills of exception taken by Evelina Anderson are passed over unnoticed, our decision being in her favor, notwithstanding the rejection of testimony.

We think that justice requires the case to be remanded for a new trial, on the charge of fraud against Clement Brown.

It is therefore adjudged and decreed, that the judgment of the District court be annulled and reversed; it is further adjudged and decreed, that there be judgment in favor of Mrs. Evelina Anderson and against the said complaining creditors in the revocatory action, and that said complaining creditors and opponents pay all costs incurred in said revocatory suit. It is further decreed that this case be remanded as regards the insolvent, Clement Brown, to be proceeded in according to law, and that the complaining creditors and appellees pay the costs of appeal.

EDWARD LYNCH v. T. P. LEATHERS, et al.

Article 2199 of the Civil Code applies when there is a solidarity as between the co-debtors; and can only be invoked when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
L. Madison Day for plaintiff and appellant. *Roselius & Philips* for defendant Leathers.

HOWELL, J. Plaintiff instituted this action to recover a balance due him for work and labor on a building erected for the defendant Leathers. He alleges that, as contractor or master builder, the defendant, Day, erected a dwelling for Leathers, and employed him, plaintiff, to do the painting, glazing, etc., for which he received part payment from Day; and he asks for judgment against the defendants *in solido*, with privilege on said building. To this Leathers filed a separate answer, pleading a general denial, averring that he made no contract with plaintiff; that no attested account was served on him, as required by law; and that he owes Day, the contractor, nothing. The defendant Day made no appearance. Plaintiff filed a supplementary petition, setting forth that, in the construction of said building, the defendant Day acted simply as the agent of Leathers, and did not disclose his principal, and renewed the prayer of his original petition; to which Leathers answered by a general denial.

During the trial, the following document was introduced:

"By agreement between Edward Lynch and Wm. K. Day, it is contracted that Wm. K. Day shall, and he does now, transfer to Edward Lynch all claim he may have against Captain Leathers, on account of work done on the house of Leathers by Edward Lynch; and the said Edward Lynch *hereby releases* Wm. K. Day from all liability, on account of work done by him on the house of Captain Leathers. New Orleans, May 1st, 1860. (Signed) A. T. Steele, attorney for Lynch. Wm. K. Day."

The defendant Leathers contends that this operated as a release in his favor likewise, and relies on Article 2199 C. C., which provides that: "The remission or conventional discharge in favor of one of the co-debtors, discharges all the others, unless the creditor has expressly reserved his right against the latter. In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission."

This article applies where there is a solidarity as between the co-debtors, and can be invoked only when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged. But, in this case, the defendant, Leathers, under the amended pleadings and the evidence, could have no recourse against Day for any amount, if compelled to pay plaintiff's claim, as Day is shown to have acted as his agent in superintending the construction of the building. At the time

of employing plaintiff he failed to disclose his real capacity; but the latter, in an amended petition, has set it forth, and the defendant, Leathers, has urged no objection to such course of action.

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We are of opinion that, under the pleadings and evidence as before us, the defendant is liable to plaintiff for the work and labor of the latter on his house.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be avoided and reversed, and that plaintiff, Edward Lynch, recover of defendant, T. P. Leathers, the sum of six hundred and sixty-four dollars, with legal interest from April 4, 1860, and costs in both courts.

A. S. COULON v. A. G. SEMMES et al.

Redhibition is called the avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Thomas H. Hewes for plaintiff. *A. G. Semmes, pro se.* *Clark & Bayne* for warrantor.

HOWELL, J. This suit is brought to rescind the sale of a slave, on the alleged ground that she was afflicted with a redhibitory disease.

It is shown, by the evidence of several physicians, that the disease in question is curable, and that while the complaint impairs the usefulness of the slave, it does not prevent her from discharging the ordinary duties of a house servant, and that, by proper medical treatment, it can be cured in the course of two or three months, and the patient, during the time, "do the general house-work."

There is no proof that the slave was incapacitated at any time from doing the work required of her by plaintiff, or that any effort was made to effect a cure; nor is it shown affirmatively that the use of the slave was rendered so inconvenient and imperfect by this defect, that it must be supposed that the buyer would not have purchased had she known of its existence. C. C. Art. 2496.

We are of opinion that plaintiff has failed to make out a clear case of redhibition.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, and that there be judgment in favor of defendant, with costs in both courts.

THE MAYOR et al. OF CARROLLTON v. A. GAILLARD.

A citation of appeal to this court, from a judgment rendered by a justice of the peace, must be issued as if it had been rendered in a district court, otherwise the appeal will be dismissed.

A PPEAL from *John D. Kemper, Esq.*, Parish of Jefferson.
C. Buisson for defendant and appellant. The appellees made no appearance.

ISLEY, J. The defendant appeals from a judgment rendered against him by *John D. Kemper, Esq.*, a justice of the peace in and for the parish of Jefferson, by which he was condemned to pay the plaintiffs thirty-five dollars; twenty-five dollars of which was the amount of a license for keeping a dairy for over fifteen cows, and the balance, ten dollars, for a violation of the ordinance in not taking out the license.

The constitutionality of the ordinance is impugned.

On the 11th November, 1861, on motion of *C. Buisson, Esq.*, of counsel for appellant, a writ of *certiorari* was issued to the justice of the peace, directing him to complete the record by furnishing a copy of the ordinance introduced on the trial, and granting a delay for that purpose until the 19th of the same month, 1861.

On the 16th of November, 1861, a new transcript of the record was filed in this court, which the justice certifies as a true copy of proceedings as set forth on his docket; and he subjoins the following statement: "I hereby send the ordinance of the city of Carrollton which was omitted in transcript."

The ordinance alluded to is not to be found in or attached to the transcript. There is no evidence whatever that the appellees have been cited according to law, the only mode by which they can be called to answer this appeal. 533, 584 C. P. It is true, a motion for an appeal was made before the justice, but we do not deem the amendment, in this particular, to Articles 573 and 574 C. P., as applicable to appeals like this, as such motions must be made at the same term at which judgment was rendered, and there are no regular terms in the courts of justices of the peace. The appellees have not appeared.

The appeal must be dismissed. *Délery v. Tavinet*, 15 La. 214.

It is therefore ordered, adjudged and decreed, that the appeal in this case be dismissed, at the costs of the appellant.

GUSTAVE BOULIGNY v. MME. EDMOND FORTIER AND HUSBAND, et als.

Where there is no error of law appearing on the face of the record, the case will not be dismissed. The act of mortgage is not a negotiable instrument; and, unlike the notes which it secures, when assigned, is subject to all equities between the original parties.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. Rosseau & Philips* for J. A. Marle, Intervenor and appellant.

D. Augustin for plaintiff.—The incapacity of the wife to contract is removed by the assent of the husband (C. C. 1775, 2420, 1779); but this is true only in cases where she can legally contract. For example, she can only contract with her husband in certain cases. C. C. 2421. She can not, excepting in certain enumerated cases, dispose of her dotal property. C. C. 2337. She cannot, when there exists a community of acquets and gains between her and her husband, acquire property for her separate account. C. C. 2371. To this last rule we have also exceptions, which will be hereafter noticed. Nor are the declarations of a married woman, in the generality of cases, binding on her, unless verified, or unless she has been benefitted by the contract; and the reason is, the controlling influence which the husband is always presumed to exercise on all her acts.

"Si la femme prenait en contractant la qualité de fille majeure, de femme divorcée ou de veuve, le contrat n'en serait pas moins nul: autrement ce serait ouvrir une voie pour éluder la loi.

Celui qui a contracté avec une femme doit s'imputer de n'avoir pas connu son état; ce n'est de la part de la femme qu'un simple dol qui ne peut donner lieu à aucune action criminelle. C'est un mensonge mais non pas un faux caractérisé."

Toulier, vol. 2, No. 622. *Pitchev v. Kerr*, 7 An. 145. *Mrs. Delery v. Her Husband et al.*, 7 An. 293. *Mosusier v. Kuntz et al.*, 14 An. 15. *Ib.* p. 169, and the numerous authorities therein cited. *McIntosh v. Smith*, 2 An. 757.

The husband is only responsible to his wife for the amount of her paraphernal property alienated, when it is proved that he has received the price or otherwise disposed of the same for his individual interest. C. C. 2367. *Olivier v. Her Husband*, 6 Rob. 36. *Suc. of Hurgis*, 3 An. 142. This proof, under the French Code (Art. 1450), results from the simple fact that the husband was a party to the act, and *multo magis* when he actually received the price. Troplong 2, 1447. Marcade 5, 1450. The same rule, with certain qualifications, prevails in Louisiana. *Gillet & Co. v. Deranco et al.*, 6 An. 590.

By a strict interpretation of the Arts. 2314, 2370 and 2374, all the effects of the spouses not satisfactorily established to have been brought in marriage, or acquired during the marriage by inheritance or by donation made to the one or to the other particularly, constitute the assets of the community or partnership of acquets and gains. We have already seen

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the exception created by the Art. 2421, the Arts. 128 and 2336. We have no doubt that the wife may legally make an exchange of her paraphernal property, although our Code does not, as the Code Napoleon, 1407, contain any provision to that effect; and it is now the well settled jurisprudence of this State that the right of the wife to administer personally her paraphernal property and to alienate the same (C. C. 2361 and 2367) implies the faculty of investing or re-investing her paraphernal effects.

Dominguez v. Lee, 17 L. R. 299. *Terrell v. Sindie*, 1 Rob. 367. *Gonor v. Husband*, 11 Rob. 526. *Stroud et al. v. Kuntz et al.* 2 An. 930. *Young v. Young*, 5 An. 611. *Hanna v. Pritchard*, 6 An. 730. *Metcalf v. Clark*, 8 An. 286.

Under the *French Régime dotal*, as under our Civil Code, the property which is not declared to be dotal is paraphernal (C. N. 1574, C. C. 2360); and the wife has the administration and the enjoyment of her paraphernal property, but she cannot alienate it without the authorization of her husband or of the judge. C. N. 1576. C. C. 2361 and 2367. And under the French conventional community, the spouses may stipulate a simple community of acquets, which would then consist of the acquisitions made during the marriage by the spouses, jointly or separately, with the savings of their common industry and the fruits and revenues of their separate property. C. N. 1498. C. C. 2371.

Thus it is perceived that the provisions of our Code, in relation to our legal community and the paraphernal property of the wife, are a combination, or at least bear a great similarity to the *Régime dotal* and *Communauté réduite aux acquets*.

Thus again under the *Régime dotal*, the husband who enjoys the paraphernal property of the wife is liable to all the obligations of the usufructuary (C. N. 1580); and under our Code, 2367 and 2368, the wife has an action against her husband for the restitution of her paraphernal property.

The system of *remploi* (reinvestment) is not as ample under our Code as under the Code Napoleon; but it is sufficiently recognized to authorize us to invoke, to a certain extent, the authority of the eminent French commentaries and jurists who have exhausted the subject.

That the system itself is not foreign to our laws is apparent, among others, from the following Articles of the Civil Code: 2336, 2340, 2341, 2355, 2421 and 70.

We have stated that the right of the wife to invest or reinvest her paraphernal effects, is derived from the liberal interpretation given to the Articles 2361, 2367 of the Civil Code. Were it not so, the investment would inure to the community to the extent of the amount invested. We have searched in vain in our reports for a case where the right of the wife to invest beyond her means was sanctioned by the court, but we have, on the contrary, found numerous decisions either setting aside conveyances made to the wife on the failure to show adequate means, or maintaining similar conveyances by reason of such adequate means. *Ellis v. Rush*, 5 An. 116; *Squier v. Stockton*, 5 An. 742; *Young v. Young*, 5 An. 60; *Metcalf v. Clark*, 8 An. 286; *Pearson v. Pearson*, 15 An. 119; *Clark v. Norwood*, 12 An. 598; *Cormier v. Ryan*, 10 An. 688; *Bass v. Larche*, 7 An. 104.

As the ability of the wife to acquire, during the marriage, property in her own name and for her separate account, is under our jurisprudence an exception to the general rule. C. C. 2384. It must be, therefore, strictly and rigidly construed; and consequently the wife is required, not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her, reasonably at least, to make the new acquisition; otherwise the contract will be treated as a contract of the community. Such, without doubt, would be the result in a contestation between the creditors of the husband and the wife; and we can see no good reason to depart from the converse of the proposition, by denying to the wife the privilege of showing the true character of the contract, because of her declarations, which, as we have already stated, do not conclude her. 6 Rob. 65, *Prudhomme v. Edams*; *Erwin v. McCallop*, 5 An. 173; *Patterson v. Frazer*, 5 An. 586. The authority to invest does not carry with it the unbounded liberty to run into wild and ruinous speculations, and was never intended to place the wife having paraphernal property on a footing of perfect equality with a wife separated in property by judgment, or by contract, as would be the case, did we hold the third opponent to her contract.

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We, therefore, concluded that it is against the policy of the law and the spirit and letter of our system of legal community to sanction contracts made by the wife, under pretext of investing her paraphernal effects, when, as in the case at bar, the amount invested bears no proportion to the value of the property substituted in its place, but, on the contrary, that all such acquisitions belong to the community, saving always to the wife her action for the reimbursement of the price contributed by her.

Our notions of the necessary conditions to constitute a valid investment, are perhaps more inflexible (apart from certain forms which do not here require notice) than those generally entertained in France, but this is due principally to the difference which marks the two systems, as will be at once perceived by reading the Articles 1407 and 1408 of the Napoleon Code; yet we are not the less satisfied that our conclusion, as to the real nature of the Livaudais purchase, would undoubtedly be the same under the French tribunals. The controlling opinion in France is, in spite of Article 1407 N. C., that when the property received in exchange, or acquired by way of *remploi*, by one of the spouses, is of double the value of the one ceded in counter exchange, or of the price invested, that the undivided half of the newly acquired property belongs of right to the community; but that when the difference is more than fifty per cent, then the property belongs either in whole or proportionally, to the community, according to the particular facts of each particular case. Pothier, *Traité de la Com.* Part 1st, Ch. 2, Nos. 197 and 198; Marcadé *verbo Cont. de Mar.* vol. 5, Art. 1435, S. 2; Troplong vol. 1, 637; Duranton vol. 14, Nos. 195 and 391.

The third opponent, John A. Merle, from the facts that the notes by him discounted from Bouligny & Ganucheau, showed on their face that they were given by a married woman, had sufficient notice to him, as it was so to the world, to put him on inquiry as to whether these notes had inured to her own separate use, before he discounted them. *DeGaulon v. Matherne, Wife of Girod*, 5 An. 495; 4 R. 508, 1st Art. 428.

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This doctrine, which has been recognized by the Supreme Court, from 7 N. S. 64 down to the decision herein rendered, flows from the plain principle of the civil law, "*Qui cum alio contrahit non ignarus conditionis ejus esse debet.*" Dig. Lib. 50, Titre 17, L. 19.

The Livaudais plantation, which was mortgaged for Boulnigny and Ganuchean's notes, transferred by them to the third opponent, has been declared by the Supreme Court to be community property, although purchased in the wife's name, consequently subject to her legal mortgage, which is much anterior to that of the third opponent.

Consequently, all acts of mortgage and notes furnished by the said wife, with authority of her husband, not shown to have inured to her own separate benefit, are obligations for the payment of community debts, which her husband was bound to pay, and for which she was forbidden by law to bind herself. C. C. 2412, 1784.

Supposing the case that the notes of the appellee, Mme. Edmond Fortier, could be viewed as negotiable notes, the mortgage given to secure the same did not partake of that negotiability. See *Schmidt v. Fr.*, 6 R. 435; 5 An. 495; 5 N. S. 56.

HOWELL, J. In February, 1853, the defendant, Mrs. Edmond Fortier, authorized by her husband, purchased of J. A. Livaudais a plantation and the slaves thereon, in this parish; paying part cash, giving her own four notes, secured by mortgage on the property, for a part of the price, and for the balance assuming certain incumbrances then existing on said property.

In March, 1856, during the ownership under said purchase, she issued four other notes to her own order, amounting to \$18,000; and, to secure their payment, executed a special mortgage on said property in favor of her factors, Boulnigny & Ganuchean, of this city, or any holder thereof. In December, 1857, she drew four drafts, amounting to \$25,000, in favor of Wm. Holmes & Co., on, and accepted by, said Boulnigny & Ganuchean, and gave the latter another mortgage on said property, to protect them against the payment thereof.

The plaintiff, Gustave Boulnigny, as the holder of the last of the four notes given by her in part payment of the purchase price, in 1853, caused the property to be seized and sold under executory process; and, becoming the purchaser at said sale, retained in his hands under Art. 707 C. P. the sum of \$38,540 64, to satisfy *pro tanto* the said two special mortgages in favor of Boulnigny & Ganuchean. In this proceeding Mrs. Edmond Fortier intervened by third opposition, making her husband, the plaintiff, and the mortgagees, Boulnigny & Ganuchean, parties; and, on appeal, this court rendered a judgment in her favor, declaring the said purchase from Livaudais, and the said two special mortgages in favor of Boulnigny & Ganuchean, to be for account of the legal community existing between her and her husband; releasing her from all personal liability growing out of said acts of sale and mortgage; condemning her husband to pay her, in restitution of her paraphernal property, \$46,188 38, with a legal mortgage on all his immovable property; ordering the plaintiff or his succession to pay to her, in part satisfaction of said sum, the said amount of \$38,540 64, retained as aforesaid by the plaintiff, and in de-

fault thereof the said property, purchased by said plaintiff, be seized and sold for cash.

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Jno. A. Merle, third opponent herein, having in due course of business become the holder of the four mortgage notes, amounting to \$18,000, issued by Mrs. Fortier in March, 1856, to Bouligny & Ganucheau, claims payment thereof, as next in rank, with privilege, out of the said sum of \$38,540 64, held as aforesaid to satisfy said two mortgages.

To this third opposition Mrs. Fortier sets up the plea of *res judicata*; denies that she ever derived any benefit from said transaction, and denies ownership of the property mortgaged, and generally all the allegations of the petition of third opposition.

Upon these pleadings and the evidence (including the pleadings and evidence in the whole record in this case), the district judge dismissed the third opposition of Merle, from which judgment he appeals.

The appellees, Mrs. Fortier and husband, make a motion to dismiss the appeal, under Art. 897 C. P.; but it is manifest that this motion cannot prevail, as the evidence is before us, and the clerk's certificate is in due form.

On the merits, we are of opinion that the district judge decided correctly in dismissing the third opposition.

It will be observed that the appellant is seeking to enforce his rights of mortgage upon the proceeds of the sale of mortgaged property, and not to recover judgment on negotiable paper. As to the transferee and holder of the mortgage notes, he has no greater rights under the act of mortgage than his transferors, the original mortgagees, had; and, as to them, it is decided that this mortgage is without effect against Mrs. Fortier, and must yield to her claim or right to this very fund. The act of mortgage is not a negotiable instrument, and, unlike the notes which it secures, when assigned, is subject to all equities between the original parties. See 8 R. 435.

The record before us presents nothing to change or modify the judgment in favor of the wife. There was a community of acquets and gains existing between Mrs. Fortier and her husband when she gave the mortgage in question on the property, which is shown to be community property, and from the sale of which this fund was derived; and her right to a judgment recognizing her mortgage as attaching to said fund is not affected by any evidence adduced by Merle, the appellant.

Judgment affirmed, with costs.

PECOUL, Executor, v. DE MAHY.

To obtain damages for a frivolous appeal the appellee must bring himself within the requirements of the law, and claim them in his answer.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. E. Bermudez*, for plaintiff.

HOWELL, J. This is an appeal from an order of seizure and sale. Our attention is not called to any error in the proceedings or deficiency in the authentic evidence, as the basis of the writ.

The appeal appears to have been taken for delay; but the appellees have not brought themselves within the requirements of the law to obtain damages.

Judgment affirmed, with costs.

SOSTHENES ROMAN et als. v. JACOB DENNEY et als.

In actions of revindication of real property, or when proceedings are instituted in order to obtain the seizure and sale of real property, the defendant may be cited either at the place where the property is situated, or where he has his domicile, at the option of the plaintiff.

There is no necessity for alleging or proving demand or protest of mortgage notes.

On an appeal from an order of seizure and sale, the legality of the order only can be examined. Other irregularities must be corrected in the court *a quo*.

When a co-defendant does not join in the appeal, his or her status cannot be enquired into.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. F. A. Grima* for plaintiffs. *Whittaker, Fellows and Mills* for Denney, defendant and appellant.

HYMAN, C. J. This is an appeal from an order of seizure and sale by one of the defendants, Jacob Denny. The other defendants have not appealed.

Defendant Denny relies on an assignment of errors as follows:

1. There is no proof that Rachal Sank is a single woman.
2. The suit or proceeding could not be instituted, except in the parish of St. James, where the property ordered to be seized and sold is situated.
3. No proof showing that the notes were duly demanded and protested at place where made payable.
4. That no demand of payment or notice of seizure and sale was served on appellant, as required by law.
5. That the whole proceeding was illegal and irregular.

First. The answer to this assignment of error is that Mrs. Sank has not appealed, and does not complain. When she appeals, it will be proper to hear her defence, and not before.

Second. This assignment of error is answered by the fact, that defendant Denny was a resident of New Orleans when the order was granted. See Code of Practice, Art. 163.

Third. The answer to this assignment of error is that it was unnecessary to allege or prove demand. See 13 An. 98; 12 An. 551 and 671.

Fourth. On an appeal from an order of seizure and sale, the legality of the order alone can be examined. If there should be any irregularity in giving notice, or in making demand, it may afford cause for injunction, or other relief, in the court below; but cannot be examined on appeal. See 6 Rob. Rep. p. 60.

The fifth assignment of error is too vague and indefinite for the court to take it into consideration.

It is ordered, adjudged and decreed, that the order of seizure and sale be affirmed, and that the sheriff seize and sell the property described in the order, except the negroes therein mentioned. See Constitution 1864, title 1, Art. 1.

It is further decreed that appellant pay the costs of appeal.

ROMAN
DENNEY.

GERMAN EVANGELICAL CONGREGATION OF LAFAYETTE v. H. PRESSLER.

The statutes and regulations which corporations enact for their police and discipline, are obligatory upon all their respective members, who are bound to obey them, provided such statutes contain nothing contrary to the laws of public liberty, or to the interest of others.

There is one principle common to the trustees of all incorporated churches. They have the possession and the custody of the temporalities of the church. They are considered *vis-à-vis* effect entitled to the possession, and are lawfully seized of the grounds, buildings, and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion, made against their will, whether by the pastor, members of the congregation, or by strangers.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
E. Hiestand and E. & G. Schmidt for plaintiff. *Durant & Horner* for defendant.

LSLEY, J. This suit was instituted in the year 1858, by the plaintiffs, a religious congregation, against the pastor, to have him enjoined from acting as minister or parson of the congregation, and from disturbing the plaintiffs in the peaceable enjoyment of its property and rights, as described in their petition, and for a perpetuation of the injunction.

The defendant urged several exceptions to the plaintiffs' right of action; but, if they were overruled, then, he pleaded the general issue.

There is no means of ascertaining from the record, in the informal manner in which it is presented, what disposition was made of these exceptions; and, as the case was examined on its merits, we must presume they were waived.

During the progress of the proceedings in the lower court, a rule was taken by the defendant on the plaintiff, to show cause why the suit pending should not be discontinued, it having, at a general meeting of the

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PRESLER. congregation, duly convened and held, been resolved that the suit was unauthorized and disapproved by the council, and that it was ordered, thereby, that the suit should be discontinued.

The suit, after trial of the rule, was ordered by the court below to be discontinued, but this judgment was reversed on appeal.

It is to be greatly deplored that in controversies like this one, exposing bickerings in religious communities, which should not occasion undue publicity, it should be found at any time necessary to invoke the interference of judicial tribunals. When discord usurps, in congregations, the seat of harmony, how wise and salutary is the admonition of St. Paul, in his Epistle to the Corinthians, to his brethren in the faith, should dissensions prevail among them to refrain from going to law with one another!

This case is before us, and we shall proceed to examine it.

It seems that the defendant was the pastor of the German Evangelical Congregation of Lafayette. He was, in that capacity, presumed, of course, to be conversant of the statutes and regulations of the corporation, and bound to obey them (Article 436 Civil Code); the more particularly as he was an advisory member of the church council, representing, for that purpose, the congregation.

Charges of a compromising nature having been preferred by the counsel against the pastor, it was, by a formal resolution, determined that his functions as pastor should be suspended for the space of six months, from and after the date of the resolution, and that he should not perform services in the name of the church until all matters pending were disposed of.

This resolution, unanimously adopted, was in due time notified to him, as shown at page 34 of the transcript; but he disregarded it; and, although he did not actually participate in breaking open the church door, which had been twice closed by the council, he persisted, on both occasions, in holding divine service in the church.

See the testimony of *Hackbury, Fabean, Wurm and P. Miller*.

As pastor of the congregation, he was earnestly directed by its regulations to act as a good householder, and to bring forth from the rich treasury of the Gospel, things old and new, which was incompatible with the indulging in offensive and derogatory invectives, whilst officiating as clergyman, against the church council. One witness says that the pastor, Pressler, openly accused the trustees of being dishonest men; and another witness attributes to him, the assertion in church, that he would bring the character of the trustees down, and if he could not bring their character down he would bring their property down. I will not only, said he, deprive them of their good name, but also of their fortune. See the testimony of *H. P. Waller and Fabean*.

Such a course as this was not the one to be resorted to, to heal dissensions in the congregation; but was, on the contrary, pursued by him, calculated to widen the breach which, unfortunately, there existed between the two parties in the congregation, of which the witness, *Jacob Alexander*, makes mention.

It was through the instrumentality of its pastor that the house became divided against itself. Instead of setting, as the teacher of the doctrines

of Christianity, an example of decorum and obedience to his revolting flock, he seemed intent on sowing among them the seeds of discord; and the consequence was, the enacting of such a scene as that described by the witness, *Jacob Alexander*. He says: "I went there (to the church) two or three Sundays after; I cannot tell exactly when. Kaiser, the President, and the trustees, called for Mr. Wallace to preach. There were two parties, and each wanted their own preacher. When Mr. Wallace came they commenced to fight; some give him a slap, and others a kick, and so on. Before the church was closed they had a little revolt; then Mr. Pressler came to me, and told me there is a little row between some of the members of the church and the ministers; there is a paper; it is to keep the peace in the congregation; and he asked me to sign it, and I did so."

The defendant was using every means to oust the old board of trustees, some of whom, at his instance, were arrested and taken to prison; but it was maintained in its functions by the decree of the court in the *quo warranto* suit of *Kaiser v. St. Paul*.

It was the duty of the council (chapter 2, § 4) to keep employed a good preacher; to declare the pastorship vacant in a certain case (chapter 11, § 4); and, in case of misunderstandings between the pastor and church council, to take steps to supply a successor to the last incumbent. (Chap. 3, § 5, See Resolutions of 21st July and 2d August, 1858; also, Arts. 429 and 430, Civil Code.)

The sentence of an ecclesiastical, a classic or a Synod (the mode for removing such an officer of the corporation, adopted in some of the German or Dutch Reformed churches), is not needed in the German Evangelical Congregation. Its power to suspend or remove its minister is derived from its by-laws, in accordance with its charter; and the mode resorted to by it was a lawful means of attaining the end of keeping a good preacher employed.

The pastor was appointed during the pleasure of the council, and very little formality was needed, and no notice was required to suspend or remove him. See chapter 11, section 7. p. 251, Angell on Corporations.

There is one principle common to the trustees of all incorporated churches. They have the possession and the custody of the temporalities of the church. They are considered *virtute officii* entitled to the possession, and are lawfully seized of the grounds, buildings and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by the pastor, members of the congregation, or by strangers.

This is the doctrine held in the somewhat analogous case of *The People v. Runkle, pastor*, vol. 9 Johns. N. Y. Rep. It is that held in the *Church of St. Francis v. Martin*, 4 Rob. p. 62.

The plaintiffs ask for the equitable interference of this court to sustain them in their lawful rights and privileges, which, from the evidence adduced, they have the legal right to claim. See, in *Tothill, case of Town of Yarmouth v. Bishop of Norwich*, 66.

The judgment of the lower court must be reversed.

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It is therefore ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed, and proceeding to give such judgment as should have been rendered by the court below, it is ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the plaintiffs, the German Evangelical Congregation of Lafayette, and against the defendant, Hermann Pressler, and that the said defendant be perpetually enjoined and inhibited from acting (under his appointment previous to the inception of this suit) as minister or pastor of the German Evangelical Congregation of Lafayette, and from disturbing the plaintiffs in the peaceable possession and enjoyment of the church property, as described in the petition.

It is further ordered, that the costs in both courts be paid by the defendant and appellee.

HOWELL, J., recused.

JOHN MORGAN HALL v. E. W. BEGGS et als.

Where documents offered in evidence below are not to be found on the record, the appeal will be dismissed.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
W. W. Handlin, Warrantor, *pro se*.

LABAUVE, J. W. W. Handlin, defendant and warrantor in this case, has filed a motion to dismiss the appeal, on the ground :

"That, though the clerk certifies that the record is complete, the record itself shows that it does not contain the evidence adduced."

The record shows that the defendant and appellee offered in evidence, on trial, the extract of the assessment roll, and the record and judgment of the suit of the *State of Louisiana v. John M. Hall*. The documents so offered below are not to be found in the record, and we are without the means of reviewing the case. It was the duty of the plaintiff and appellant to see that the record contained all the evidence on which the case was tried. 8 An. 433.

Appeal dismissed, at appellant's cost.

MANUEL FERNANDEZ v. MERCHANTS' MUTUAL INSURANCE COMPANY.

An insurance company will not be liable because the fire warden advised the removal of property from a burning building, and it was stolen during the transit.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Levi Pierce and Durant & Hornor for defendant.

C. Hunt and L. Castera for plaintiff and appellant. — Cigars are goods very liable to be missed at a fire; such things cannot be avoided.

Michal Deggan, witness for plaintiff, says: That the roof of the building was burnt considerably, and also the openings and corner windows were all scorched; the engines played on the building.

Léon Lamothe, another witness, says: That he was present when *Villa* (Fernandez's clerk) asked Mr. *Youenes* if he should not remove the contents of the store. *Youenes* said not yet, but get all ready.

A little while after, *Villa* asked *Youenes* if he would move out the stock, and *Youenes* told him yes, and during the removal plenty of the cigars were stolen; they were taken forcibly out of the hands of those who were removing them.

The other witness heard gave the same evidence.

The above testimony shows most conclusively, that Manuel Fernandez did not intend to remove the stock of cigars for his own use, benefit or interest. His rights were not only protected, but secured beyond any doubt, by the two policies sued upon; the loss by fire and water being certain. And then what did he do? He applied to the fire warden for the removal of the stock; and if he ever intended to remove the cigars for himself, he did not want the consent or approbation of any body, even the fire warden, but to act according to his own will. What was the reply of Mr. J. *Youenes*? No; wait; the fire may be checked, and when he sees the roof of the store taking fire; now, says he, remove the stock of cigars; and, as the weather was threatening rain, then he sends for tarpaulings to protect the merchandise; and he does this, not for the interest of Fernandez, but in behalf of the company, to protect them and diminish their loss.

P. A. Boudousquié, a French writer on fire insurance, p. 289, says:

"L'assureur, s'il se trouve sur les lieux aussitôt que le sinistre se déclare, dirigera le sauvetage."

And at the page 290, the same author adds:

"Comment, en effet, l'assureur pourrait-il être privé du droit de diriger le sauvetage, puisqu'il s'est mis, arrivant le sinistre, au lieu et place de l'assuré. . . . C'est sa propre chose qu'il s'agit de conserver et qu'en travaillant au sauvetage il ne fait que ce que l'assuré lui-même serait obligé de faire en son nom." Reference is made by the writer to Valin sur l'art. 51 de l'Ordonnance, titre des assurances. Emerigon, chap. 17 See 7, §2.

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"Le recouvrement des effets naufragés, dit Emerigon, se fait pour le compte de qui il appartient, sans qu'on ait besoin d'aucun mandat de la part des personnes intéressées, l'action negotiorum gestorum defere tous les pouvoirs que l'urgence du cas exige. Ce qui se fait pour le recouvrement du navire et des effets on est censé le faire que pour les assureurs."

HOWELL, J. This is an action upon a policy of insurance to make defendant liable for goods stolen, while being removed from a building damaged by fire. A clause in the policy expressly excludes responsibility for loss of property by theft, during or subsequent to the fire; but plaintiff, the appellant, contends that, under a legal and equitable interpretation of the terms of the policy, the defendant is made liable, by reason of its agent, the firewarden having ordered the removal of the property from the burning building.

Admitting that the action is properly brought, to enforce such liability under this particular contract of insurance (upon which we are not called on to express an opinion), plaintiff has failed to show that the firewarden undertook to remove the goods on behalf or for account of the defendant. On the contrary, it is proven that the plaintiff himself undertook the removal, at the suggestion and on the advice of the firewarden, whose duty and authority, in this respect, are aptly described by the president of the company, to wit: "To advise parties who are insured as to the removal or disposition of their property, and, in case of their refusal, to intervene in behalf of parties concerned." Plaintiff did not refuse, so as to require this intervention, and his acting upon the advice of the firewarden did not change the rights and obligations of the parties to the contract.

Good faith, it seems, would require both parties to do all in their power to make the loss as small as possible, and as there was express exclusion of liability for the course set forth in this action, it was incumbent on plaintiff to show, beyond reasonable doubt, that defendant did some act to incur liability for such loss. The stealing by the crowd was neither a necessary nor direct consequence of the fire, and the loss was clearly not within the contemplation of the parties at the time of contracting, and no subsequent act of the defendant is shown to create a liability, as charged.

Judgment affirmed, with costs.

SUCCESSION OF DAVID BARBOUR.

Heirs, while they are not concluded by a tableau of distribution, have yet the right to appear and oppose it.

A rule is not the proper mode to dispose of an opposition, when excepted to.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Martin Blache for absent heirs, opponents and appellants. *Roselius*
& *Philips, contra.*

HOWELL, J. This is an appeal from a judgment dismissing the opposition of heirs to the homologation of a provisional tableau, filed by the dative testamentary executor.

While heirs may not be concluded by the homologation of a tableau of distribution, yet the right to appear and oppose such tableau during the administration cannot be questioned nor denied to them. Such action, on their part, may tend to lessen litigation and delay, and may prevent the illegal distribution of funds, which they have a direct interest in having properly distributed.

We find in the record the judgment sustaining an exception to the opposition of the absent heirs represented by an agent; but we are unable to find such opposition or exception, although the clerk certifies that the transcript contains "all the proceedings had" in said succession.

We think justice requires the case to be remanded for further proceedings, and feel called upon to disapprove of the form of proceeding by rule to dispose of an opposition, when excepted to, as done in this instance.

It is therefore ordered that the judgment dismissing the opposition of Helen Barbour, on 15th February, 1861, and that dismissing the opposition of the recognized heirs herein, on 15th March, 1861, to the tableau of distribution, be avoided and reversed, and that this cause be remanded, to be proceeded in according to law; costs of appeal to be paid by the succession.

J. H. A. FROST v. GARRETT & WYNNE, et als.

Damages for a frivolous appeal must be asked for in the answer of the appellee.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Hays, Adams & Morgan for Lewis & Oglesby, garnishees and appellants.

T. J. & W. H. Cooley for plaintiff.—This suit began by attachment Lewis & Oglesby, a commercial firm of the city, were made parties as garnishees and questions propounded to them. They answered, admitting they had funds in their hands to the credit of defendants, Garrett & Wynne, amounting to \$620 71. The garnishees admitted in their answers an unconditional liability for the amount to defendants, and urged no plea of defence whatever. The defendants, Garrett & Wynne, confessed judgment for the amount claimed against them; and judgment was accordingly entered in favor of plaintiff, recognizing his privilege upon the sum of \$620 71, in the hands of Lewis & Oglesby, and ordering them to pay over to plaintiff the amount so attached in their hands. It will also be noticed that defendants consented, in writing, that the sum attached in the hands of garnishees be paid over to the plaintiff. This judgment was rendered and signed on the 8th of June, 1861.

The garnishees have appealed from this judgment. The special errors set forth by them in their motion for an appeal, are : 1. The courts were, by formal decree, adjourned previous to the 8th June, 1861, and consequently no decree could be rendered against them. 2. That the judgment was improperly signed on the 8th June, the same day it was rendered ; when, by law, it could not be signed except after three days. The third ground is a general one, that the judgment does him an irreparable injury.

The record does not furnish any specific evidence in relation to the adjournment of the court. The only testimony in relation to the matter is found in the opinion of the judge of the court below, on the motion to set aside the appeal. We are satisfied to submit that point on the opinion of the judge below.

In relation to the second ground, that the judgment was prematurely signed, it is sufficient to answer that this did not injure in any manner the party. He could still have applied and obtained a new trial. The Supreme Court has recognized the doctrine that applications for new trials can be made after the signature of the judgment, if done before the expiration of three days. See *Marigny v. Stanley*, 2 L. 322 ; *Hubbell v. Clannon*, 13 L. 496.

The judgment has not operated to the injury of the garnishees. The rule is, that garnishees are merely stakeholders. The only issue they can raise is for the purpose of protecting themselves in relation to the validity of the payment by them to the attaching creditors. In this case no

issue whatever was raised by the garnishees; they simply came into court and admitted they owed plaintiff a certain sum of money. This was, to all intents and purposes, a confession of judgment, which estops the party from appealing. 5 R. 447; C. P. 567; 14 L. 523; 5 A. R. 598.

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Had the garnishees any valid defence to paying this money, it was their duty to urge it in the answers they made to the interrogatories. Having admitted an unconditional liability, it is to be presumed they had no just ground with which to defend themselves.

HOWELL, J. This is an attachment suit in which the appellants were made garnishees, and in answer to the interrogatories propounded to them they admitted, unconditionally, that they owed the defendants \$620 71, nett proceeds of fifteen bales cotton sold by them for account of defendants.

In the judgment, subsequently rendered upon the confession of the defendants, privilege was granted upon this fund, and the garnishees ordered to pay the said sum to plaintiff.

We are unable to find any error in the judgment to the prejudice of appellants, and the appeal is evidently taken simply for delay; but there is no answer nor prayer for damages for a frivolous appeal.

The plaintiff is now dead, and his testamentary executor, Francis Brown, has, on motion in this court, been made party and authorized to prosecute this suit to final judgment.

Judgment affirmed, with costs.

HANNAH S. FLYNN v. MERCHANTS' MUTUAL INSURANCE CO.

Evidence of fraud, etc., in an action on a policy of insurance, can only be admitted when specially pleaded; it is not admissible under the plea of the general issue.

What third persons said out of court, and oral testimony of criminal proceedings, is not the best evidence, and inadmissible.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

Where the testimony, as to the amount of a certain portion of the goods destroyed, is vague and uncertain, that part will be reserved for further action.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
Field & Shackelford and Whitaker, Fellows & Mills for plaintiff
and appellant. *Durant & Hornor* for defendant.

LSLEY, J. The plaintiff claims in the Fifth District Court of New Orleans, from the defendant, on a policy of insurance, two thousand dollars, for loss and damage by fire, to her stock of millinery, store fixtures

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MERCHANTS' INS. and household furniture. The risk assumed by the defendants was as follows:

1. On her millinery goods\$700
2. Store fixtures..... 500
3. Household furniture..... 800

The answer is the general issue.

Condition 8, in the policy, is in the following words:

"Also, if there appear any fraud or false swearing the claimant shall forfeit all claims by virtue of this policy."

On the trial of this case, the defendants took certain bills of exception to the ruling of the court, excluding testimony offered by them to show that the plaintiff by her fraudulent conduct had forfeited all right to claim any indemnity under the policy for her alleged losses.

The objection to the testimony offered, as set forth in the bills of exception, Nos. 1 and 2, was grounded on the absence of any special allegation of fraud to justify its admission, and the correctness of the ruling depends upon the rule, which this court has finally adopted, on this vexed question of pleading and proofs. Two decisions of the late court are referred to by the appellees to justify the admissibility of this testimony.

The first case is that of *Kennedy v. The New York Life Insurance Co.*, 10 AL. 809. It was therein held: "Under the plea of general issue, the defendant might give in evidence the illegality of the contract, coverture, lunacy, and, in fine, everything which would show that the plaintiff cannot recover. 3 Greenleaf, No. 135.

In 12 An. 39, *Hatchman v. Gondelbet Insurance Co.*, the court, referring to a previous decision in 9 An., 590, *Matthews v. Insurance Company of New York*, said: "Under the English practice, which has certainly not often been more indulgent than ours, the plea of the general issue to an action on a policy of insurance, was formerly sufficient to let in evidence of illegality, misrepresentation, breach of warranty, or almost every other matter that would discharge underwriters. 2 Arnould Ins. 1286.

By the new rules of pleading adopted on the King's Bench, in 1834, matters showing the transaction to be void or voidable on the ground of fraud, must be specially pleaded. Evidence was not excluded in either of these cases, because notice was given by the defendants in their answers, of their intention to prove fraud. In neither case, however, was there any specification of the mode and circumstances of the fraud, but such pleading was recommended by the court. The plea of intention to prove fraud was considered sufficient to let in the proof in the cases cited. We deem it safe to adopt the view taken by our predecessors, as being one calculated to remedy loose practice and to prevent surprise. Another case, not yet published, *Loundes v. Merchants' Mutual Insurance Company*, (Opinion Book, b. 29, fol. 17), is referred to as sustaining the old rule, and making testimony to show fraud admissible under the general issue; but, on examining that case, we do not discover that it bears that interpretation.

In that case, the underwriters had specially set up in their answer the false swearing by the assured, as a fraud, which the court held it to be, and evidence under that special allegation was properly admitted.

In the case at bar only the general issue is pleaded, and under that plea alone the evidence offered was not admissible.

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The deposition of *Mary Sparks* was properly excluded. She should have been produced or satisfactory evidence adduced to show that due diligence had been used to discover where she was, which does not appear.

Tappan's testimony was inadmissible to prove the general opinion of witnesses, whose duty and business it was to seek a witness, *Mary Sparks*, as to her "whereabouts;" as those witnesses themselves should have been produced, their testimony being better than unsworn opinions or declarations, made by them out of court; and so of the proceedings of the criminal prosecution, their production was properly insisted on as the best evidence.

We have examined with considerable care all the evidence adduced in this case, and we have been unable to discover any act of the plaintiff from which to infer fraud.

The main facts relied on by the defendant, from which fraud is presumed by them, are those narrated in their brief. The first one is that, on the day previous to the burning of the store, one J. B. Bradley, a constable, who had two writs of *fi. fa.* against the plaintiff, was requested to call next day under a promise of payment.

In this request we can perceive nothing but a very natural desire to be rid, at least for that day, of a very disagreeable visitor. This, notwithstanding the fire, is not a circumstance on which it would be fair to found a charge of fraudulent intention to commit the heinous offence of arson. The next specifications can be stated together: "The flames seemed to come from under the counter; the top shelves were empty; at the same time the plaintiff had goods already put up in boxes and trunks, with the store looking-glass, all on the sidewalk, while the store was locked up, and the plaintiff, with a cab in attendance, ready to drive off. After the fire, the witness *Carrico* examined the store; found boxes piled up in the middle of the store, half burned and *no goods in them*; boxes on the shelves and *no goods in them*; discovered that the fire originated under the counter; there were no remnants of burnt goods in the store."

The only witnesses who testified to these matters were two policemen, *G. Carrico* and *Charles Oilff*; the latter, however, confining his testimony to what occurred during the fire. After some preliminary statements, he says: "When we burst open the door we saw the fire under the counter; the blaze was pretty much up, and I could not see much, but saw that the shelves were empty. I did not go into the store after the fire was got out." He says, also, "I went with *Carrico* to the corner of Rampart street, and there I saw Mrs. Flynn standing by some trunks and boxes." He says, in cross-examination, the flames blazed up when the door was opened, but there was not much smoke; but *Carrico's* testimony is deemed conclusive, and it has therefore been scanned with more than ordinary attention. He was present at the bursting open the door; and he says, "when the door was burst open we had to run away; everything was in a blaze. Just as soon as the door was burst open, the flames seemed to come from under the counter. I could see that the top shelves were vacant; and then the flames burst all over and we had to run away from the door."

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This witness also saw Mrs. Flynn on the side-walk on Rampart street, and describes minutely what she had with her: a large box of goods and two large trunks, a looking-glass, a German clock and two carpet bags. He describes the contents of the box: some card ribbon, lace needles, etc.

He says: "I saw no lamp in the store; there were gas pipes, but I do not think they had exploded." And now comes the most important part of the testimony of this witness: "After the fire was exhausted, I went into the store and saw empty boxes piled up and half burned, and nothing in them; the boxes in the shelves were not burned; they were empty hat boxes. I attempted to find where the fire originated, and discovered that it originated under the counter. We found nothing but the empty wooden boxes half burned. On his cross-examination, he says the house was entirely burnt out by the fire; the store was entirely burnt up, not in ashes; there were a few shelves in the back part half burned; the front part of the store was entirely burned." In this connection, it is well to refer to the testimony of *L. Gastinel*, Lieutenant of Police.

He says: "I passed the house after the fire; it looked to me entirely burnt. When I reached the spot, the lower part of the house was all in flames; the upper part of the house was also burning."

"I examined the spot, after the fire had been extinguished, and saw that the house was in ruins," says *Fabean*, another policeman; and, from all this testimony, it is fair to infer that the store was entirely burned up; at all accounts, it may be supposed that not a vestige of the counter was left, as the fire is supposed to have originated under it; and yet this witness, *Carrico*, after the fire was exhausted, goes deliberately into the store and makes the important discovery that empty boxes were piled up, etc.; and he then discovered that the fire originated under the counter, and that the boxes on the shelves, which he and *Oilff* said, previously, were vacant, were not all burnt; they were empty. *Carrico* says the shelves were in the back part of the store, half burned; and that was where the empty boxes were, as they would probably be, if there at all.

The zeal of this witness outrides his discretion. He proves too much. He discovers *after* the store, and particularly the counter, had been entirely consumed, that the fire originated under the counter. Credulity itself could not be imposed on by such a statement, and we attach no weight whatever to his testimony.

The only circumstances which might militate against the plaintiff, are the apparent origin of the fire, the empty shelves, and her readiness for departure, with boxes and trunks and the store looking-glass, with a cab in attendance.

The apparent breaking out of the fire under the counter, if assumed to be true, which, however, the testimony does not render very certain, as the store was all in flames when the door was burst open, would not, of itself, implicate the plaintiff. It might have been the work of an incendiary, or have been accidental, and the hurried inspection of the shelves, when the door was burst open, could hardly have been a satisfactory one.

The plaintiff, "in a long white gown," was on the sidewalk with Mr. Logan, and with her were some trunks, a box, etc., the latter of which might, from their nature, have well been in the working-room over the

the kitchen, as was probably the store looking-glass, which, *Eugene Martin*, a witness, says had been taken out of the store a month before. The ownership of the trunks and other articles is not shown, although *Mr. Logan* says that one of them, when opened, appeared to contain some ladies' under-dresses. There is nothing suspicious in all this to fix fraud on the plaintiff.

"Where a criminal charge is to be proved by circumstantial evidence," says *Greenleaf*, "the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion;" and, although this is a civil and not a criminal proceeding, we think the rule not inapplicable.

It remains only to ascertain the plaintiff's loss.

The testimony being vague and unsatisfactory, in relation to the stock and value of the millinery goods destroyed, no allowance can now be made her for this part of her claim; but it will be reserved for further action. 1 Hen. Dig. (new ed.) p. 739, § 5.

The value of the store fixtures is assumed to be one hundred and thirty-two dollars, being the price she paid for them.

As to the value of the household furniture, which, it is shown, was entirely destroyed, there is a discrepancy in the testimony: one witness fixing it vaguely at one thousand dollars, and two others at three hundred. One of the witnesses who adopt the last valuation, being conversant in such matters, we adopt it as the correct one.

It is therefore ordered, adjudged and decreed, that the judgment rendered by the court below be annulled, avoided and reversed, and proceeding to give such judgment as should have been rendered therein, it is ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the plaintiff, *Hannah S. Flynn*, and against the defendant, the *Merchants' Mutual Insurance Company of New Orleans*, for the sum of four hundred and thirty-two dollars, with legal interest from judicial demand, and that the defendants and appellees pay the costs in both courts. It is further ordered, that the claim of the plaintiff for the value of her stock of millinery goods destroyed by fire, be and the same is hereby reserved to her for future proceedings.

ALEXANDER HARRIS *v.* JOHN A. PEEL.

Where the note sued on bears eight per cent. interest, no special damages will be allowed as for a frivolous appeal; and this court will simply affirm the judgment of the court below.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor for plaintiff.

JONES, J. The plaintiff, as the holder of a mortgage note, sued out a writ of seizure and sale as to the mortgaged property.

His proceedings are regular; and, upon the examination of the record, we find no error prejudicial to the appellant.

This appeal was taken for delay; but, as the note, the basis of the seizure, bears eight per cent. interest, we simply affirm the judgment, with costs.

HOWELL, J., recused.

WILLIAM HALSMITH *v.* BERNARD CASTAY.

Parol testimony cannot be received to establish a contract of sale of immovables, or show damages resulting from the non-compliance of the vendor in refusing to pass the act of sale. Even a promise to sell must be proved in writing.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
J. L. Tissot for defendant and appellant.

LABAUVE, J. Plaintiff alleges, in substance, that, on the 9th day of October, 1860, the defendant agreed and contracted to sell him certain lots of ground and buildings thereon, for \$3,000; that, on the 25th day of October, 1860, the said Castay refused to comply with the terms of sale and execute the act of sale, in consequence of which, he, the said plaintiff, has suffered damages to the sum of three thousand five hundred and fifty dollars, which the said defendant is legally and equitably liable to pay him.

He prays that said Castay be cited and ordered to comply with said contract of sale, or to execute the act of sale; or, in default thereof, to pay petitioner \$3,550, with interest.

The defendant, for answer, by way of peremptory exception, says that plaintiff's petition discloses no right of action, and, should this exception be over-ruled, then he pleads a general denial.

Upon this issue, this case came on for trial below, when plaintiff offered to prove, by divers witnesses, the allegations set forth in his petition. Defendant excepted to reception of said parol evidence to establish a con-

tract of sale of lots, as alleged in the petition, upon the ground that parol evidence could not be received, the law requiring written evidence. The plaintiff also offered parol evidence to show the damages suffered by him in consequence of the defendant refusing to comply with his agreement. The defendant objected to the said parol evidence. The court over-ruled the objection and admitted the testimony, and the defendant excepted to the decision of the court.

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We are clearly of the opinion that the District judge erred in receiving, in the first place, parol evidence to establish a contract of sale of immovables, and, in the second place, to show damages resulting from the non-compliance of defendant in refusing to pass an act of sale of the lots in question. C. C. Arts. 2255, 2414, 2415. Even a promise to sell must be proved by writing. C. C. Art. 2437; 1 An. 459; Hennen's Digest, p. 525, Evidence, 14, Nos. 1 and 2; same work, p. 526. No. 14. It is not an open question, and the jurisprudence is settled on that subject.

It is therefore adjudged and decreed that the judgment of the District court be annulled and reversed. It is further adjudged and decreed that plaintiff's demand be rejected, and that he pay costs in both courts.

SAMUEL N. HITE v. JACOB BARKER.

Any amendment of the judgment in the court below must be prayed for in the answer to the appeal; it will not be noticed in the brief.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Kennedy & Miles for plaintiff. *T. W. Collens* for defendant and appellant.

LABAUVE, J. In April, 1856, W. L. Burges entered into an agreement with defendant, Barker, whereby the latter was to purchase and pay for about 2,200 barrels at 56 cents per barrel, and to hold them on account of said Burges for ten months. Barker was to store the barrels, and Burges was to pay storage at $1\frac{1}{2}$ cents per month per barrel; and eight per cent. interest on money advanced for the purchase, and \$55 61 on the transaction. Burges was also to pay cartage, cooperage, insurance and all other charges, and to deposit with Barker \$300, a margin against loss; and if defendant was not reimbursed on or before the 14th February following, Barker was to sell at auction, or private sale, the barrels.

The barrels were not sold at the expiration of the delay, and 2,166 were shipped by Barker to Cuba, and the nett proceeds of sale, as per accounts rendered, amounted to \$2,318 37. But it appears there were 2,238 barrels purchased by and paid for by Barker, at 56 cents per barrel, and that he only accounted for 2,166, leaving a balance, 72 barrels, which were valued below at 90 cents each, making an aggregate of \$64 80;

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which amount, added to the proceeds of sale made in Cuba, \$2,318 37, makes, in all, \$2,383 17; of this amount the judge below deducted \$1,779 26 for cost of drayage, cooperage, hoops, nails, insurance, interest of money, commission and money advanced by Barker for the purchase of the barrels (less \$300 deposited by Burges with Barker), and for other charges, leaving a balance of \$603 91, for which the court below gave judgment for plaintiff against the defendant, who appealed.

On trial below, the defendant offered in evidence the case of *Sullivan v. Burges* and of the garnishment proceedings thereto, and the accounts and vouchers, letters and account sales filed in said case on behalf of the defendant Barker; to the admission of which evidence, the plaintiff excepted, in substance, on the ground that said accounts, etc., do not, of themselves, constitute proof; and that said accounts and letters are not the best evidence, etc.

The court admitted the evidence, and the plaintiff took a bill of exceptions to the opinion of the court. We think it unnecessary to pass upon this bill of exceptions, as our decision upon it would not change the judgment under the pleadings in this court; the rejection of the evidence admitted and excepted to, would not authorize us to amend and increase the judgment rendered below, in favor of plaintiff and appellee, who has failed to file an answer, in the legal delay, praying for such amendment; it is true plaintiff's counsel argues, in his printed brief, that the judgment appealed from should be increased to \$1,200 95, as balance due by defendant; but a brief is not an answer; it makes no part of the pleadings; it is a written instead of an oral argument. C. P. Art. 890.

Upon the whole, we believe that the judgment of the District court must be affirmed.

It is therefore adjudged and decreed that the judgment of the District Court be affirmed, with costs.

HOWELL, J., recused.

 JOHN GARDES et als. v. SCHROEDER & SCHREIBER.

The law requires the same amount of evidence to prove a verbal power of attorney as it does to prove a verbal contract for money or personal property; and that, when a party attempts to enforce a contract for the payment of money, above \$500, made by agent, he should prove, by at least one credible witness and other corroborating circumstances, the verbal agency.

A PPEAL from the Fourth District Court of New Orleans, *Allen, J. William H. Hunt* for plaintiffs. *Durant & Hornor* for defendants.

HYMAN, C. J. Judgment was rendered in favor of plaintiffs, and defendants appealed.

The suit is on a contract, exceeding five hundred dollars, for payment of money.

Defendants, in answer, denied that they made the contract, or authorized any one to contract.

There is no evidence that defendants, in proper person, contracted; but there is sufficient evidence that another contracted for them.

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The contract, if agency be proved, as required by law, is fully established.

One witness only proved agency. He swore that he was employed by defendants to make the contract. There are no circumstances corroborating his testimony.

We do not question the veracity of this witness. We believe that he swore truthfully.

The question, then, is not the credibility of this witness, but whether his evidence alone is sufficient, in law, to prove his agency.

The second paragraph of Article 2961 of the Civil Code, declares that a power of attorney may be given verbally, but of this, testimonial proof is admitted only, conformably to the title of conventional obligations; and Article 2257 of same Code, under title of "Conventional Obligations," provides that contracts for payment of money, or relative to personal property, not reduced to writing, may be proved by parol evidence; but, such contracts, when over five hundred dollars, must be proved by, at least, one credible witness and other corroborating circumstances.

Under this caption of "Conventional Obligations" there is no other article which is applicable to the second paragraph of Article 2961, or which authorizes testimonial proof.

We conclude, from these articles, that the law requires the same amount of evidence to prove a verbal power of attorney, as it does to prove a verbal contract for money or personal property; and that, when a party attempts to enforce a contract for the payment of money, above \$500, made by an agent, he should prove, by at least one creditable witness and other corroborating circumstances, the verbal agency.

Agency not being proved, as law requires, we remand the case.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and that this case be remanded to the District court for further proceedings therein.

PETER HEFT v. HARRY KELTY.

An appeal will lie from a judgment on a rule in the court below dismissing an opposition to an order of seizure and sale.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
J. Molloy for defendant and appellant.

Thos. H. Howard for plaintiff.—1. The appeal was granted on a rule to show cause, moved by defendant, for the purpose of quashing the writ of seizure and sale, and after all the proceedings in the cause were closed. Such judgment was not a final judgment, nor an interlocutory judgment,

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nor a judgment in the cause; but was a judgment posterior to all these. C. P. 565, 566.

2. It was a judgment on a rule, which was itself a departure from the course of practice, the defendant not availing himself of his legal remedy. It did not work irreparable injury, nor could it, by its nature, have worked any consequences adverse to defendant. It was designed to arrest the lawful proceedings of plaintiff without right and without penalty. C. P. Art. 298, and statute of April 7, 1826, p. 170, § 9.

3. All consequences, legal and direct, and all injury, if any there were, were, and must have been, caused by the order of seizure and sale, which was rendered October 20, 1865. From this defendant had his right of appeal, which right expired by limitation, October 21, 1864. C. P. Art. 593.

LABAUVE, J. The plaintiff obtained an order of seizure and sale, on the 20th October, 1863, against a mortgaged lot of the defendant, to satisfy a note of \$800.

On October 31st, 1863, the defendant obtained a rule, as follows:

"On motion of J. Molloy, of counsel for defendant, it is ordered that plaintiff, P. Heft, and T. E. Dunham, sheriff, show cause, on Wednesday, the 4th of November, 1863, at 10 o'clock A. M., why they should not cease proceedings under the order of executory process issued in the above case, on the ground that the same is in violation of Military Order No. 15, dated February, 1863; and further, why said order should not be revoked and rescinded."

On the 6th November, 1863, this rule was dismissed, with costs, and from which decision the defendant took a devolutive appeal.

The plaintiff and appellee has filed a document, which is taken to be a motion to dismiss this appeal, on the grounds, in substance: "That the judgment rendered on the rule is not a final judgment, nor an interlocutory judgment, nor a judgment in the cause, etc."

This rule must be viewed as an answer, or an opposition, to the order of seizure and sale, going to show that the order of executory process had improvidently been issued and that it ought to be set aside. The judgment upon the rule was certainly a final judgment, and either party had the right to appeal. Suppose that the judgment had made the rule absolute, would not the plaintiff and appellee have been entitled to an appeal? The answer must be in the affirmative.

Motion to dismiss overruled.

HOWELL, J., recused.

NATHAN STEPHENS v. C. C. BEARD.

Conventional interest will not be allowed upon a contract unless expressly stipulated.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Durant & Hornor for plaintiff.

LABAUVE, J. The plaintiff claims against the defendant \$775 11, with interest, at eight per cent., from the 5th November, 1860, for work and labor performed, and materials furnished, in paving street opposite the property of said Beard, as per bill annexed to and made a part of the petition. He prays accordingly, and for a special lien and privilege on the property.

The defendant answered by a general denial; but admitting, at the same time, that the paving had been done in front of the property described; denying, also, that it amounted to the sum sued for. He further pleaded in compensation the sum of \$755 against plaintiff's demand.

The account sued upon and annexed to the petition was offered in evidence.

Plaintiff also offered in evidence the contract under which the paving was done.

It was admitted that the work was done in accordance with the contract, and the production of said contract was waived and dispensed with.

The district judge, after hearing the testimony, gave judgment for the plaintiff, as prayed for, and against the defendant, rejecting also defendant's plea in compensation.

The defendant appealed from this judgment.

The defendant has made no appearance in this court. The plaintiff and appellee had the case fixed for argument, and submitted it with a prayer for damages for a frivolous appeal.

We have carefully examined the record, as the law requires of us. C. P. Art. 892. We are satisfied that plaintiff clearly made out his case by proofs, admissions and pleadings of the defendant, except that we have seen nothing to support the allowance of conventional interest at eight per cent. per annum; we do not feel authorized to affirm that part of the judgment appealed from.

It is therefore adjudged and decreed, that the judgment of the District court be so amended as to allow five instead of eight per cent. per annum, from the 5th November, 1860, till paid, and that, as amended, it be affirmed; the appellee to pay the costs of appeal.

BARTHELEMY SERIS v. BELLOCQ, NOBLOM & Co.

When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery, or damages, in case of the non-execution of the contract.

If the object to be given is uncertain, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered.

Damages are properly assessed by the judge *a quo* at the time the defendants were put in default.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
A. Lavoisier for plaintiff.—This cause was first decided adversely to plaintiff in the lower court, and came up again for a new trial on the 28th of May, 1863, upon the grounds contained at page 18 of transcript, which resulted in a judgment for plaintiff, condemning the defendants *in solido* to deliver to him, within ten days from the signing of the judgment, 18 bales of cotton of the middling quality, and weighing in the aggregate 8,050 pounds; and in default thereof, to pay to plaintiff the sum of \$1,690 50, being at the rate of 21 cents per pound, and costs of suit, etc.; from which judgment the present appeal was taken by the defendants.

The plaintiff, in answering to this appeal, admits, as to the facts and law of the case, that the judgment of the lower court is correct, but complains, that from the evidence adduced a greater rate as the price of said cotton, in the event of its non-delivery, ought to have been allowed, to wit: sixty instead of twenty-one cents. That in this only the court erred, and prays that the same be amended accordingly.

The only question of importance involved in this case is that of delivery. The facts, supported by the evidence, are these: The appellee contracted with the appellants on the 11th March, 1862, in New Orleans, for 18 bales of cotton, at the rate of 10 cents per pound, and in order to assure him of the delivery and possession of the same paid \$800 in advance, supposing it to be the proximate value at which the 18 bales would come to, for which the appellants gave him a receipt, stating the number of bales, the rate, and deliverable at the Mississippi Cotton Press. In a few days after, to wit, on the 17th of March, 18 bales of cotton, of two different marks, are supposed to have been weighed by A. Hoffman, the superintendent of that press, and each bale and their respective weights noted in pencil in the weighing book, and by him returned to the office of appellants. Two or three days after, Hoffman made an entry, which he calls "an entry of transfer," in the black book of the press. Underneath, or at the foot of this entry, are the words, "to be sold by B. N. & Co., for account of buyer." It will be observed that these words are noted in lead pencil. In the same manner are noted all the entries in the weighing book in reference to this matter.

It must be borne in mind, that in this transaction there was no broker employed on either side. Thus remained the condition of things for nearly six weeks, when, on the eve of the arrival of the national forces in

New Orleans, on the 24th or 25th of April, 1862, the then Confederate authorities ordered all the cotton at that press, numbering about 1,000 bales, to be turned out and burnt.

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It is now contended by the appellants that the 18 bales of cotton thus weighed on the 17th March, 1862, and entered in the black book of the press three days after the weighing, and in the manner and form before stated, were intended for and constituted, without further notice, a valid delivery to appellee, and that the cotton perished at his risk.

Under the facts and circumstances of this case, we cannot admit the logic of such reasoning. It is repulsive to every sense of right and justice; and, in a commercial point of view, in direct opposition to every principle of good faith and fairness, which ought to prevail in all mercantile transactions of this kind. The law does not consider that as done which has not been legally done. If custom in certain cases be invoked, as in this case, it must be fully established by evidence. *Senac v. Britchard*, 4 L. 160; *Syson v. Laidlow*, 18 L. 382.

We deny: 1. That there ever was any cotton weighed for us from the 11th of March to the 25th of April, 1862, or at any time subsequent. 2. That the weighing of the 18 bales, on the 17th March, 1862, were not designed or intended for us. 3. That the manner and form of the so-called "entry of transfer" in the black book of the press, is not in conformity to established customs and usages, and therefore too indefinite and uncertain to operate a delivery to any one. That under it the appellants intentionally retained in them the ownership and control of said cotton. 4. That supposing the "entry of transfer" be held good, and that the 18 bales of cotton thus weighed were intended for appellee, still we contend that, under the facts and circumstances of the case, it was insufficient in itself to operate a tradition or delivery to appellee without the notice of the weighing of the cotton.

It is satisfactorily proven that the appellants had, at any time prior to the destruction of the cotton, a sufficient number of bales at the press, with which they could have easily, and in a very short time, complied with their obligation. A day or two after the fire, a person connected with the house of Bellocq, Noblom & Co., the appellants, accompanied by P. Nogues, a friend of appellee, called at the press to know the condition of the cotton in general; he exhibited to the yard clerk, Michael Henebery, the receipt for the 18 bales of cotton. Of the marks noted at the foot of said receipt proved to be in the handwriting of P. Roy Noblom, one of the appellants. Henebery then reported nine bales belonging to appellants, which had been restored to the press, four of which corresponded with those marks noted and signed by Henebery. It was then that the appellee, in June following, made a formal demand for his cotton. On that occasion, Mr. Noblom admitted the burning of the cotton, and the restoration of four bales to the press, which he offered to appellee, but declined their responsibility as to the balance.

We contend that there was no delivery made to us, in a manner either sanctioned by law or by usage, of the cotton we contracted and paid for in advance and in good faith, on the 11th of March, 1862 (Arts. 2433 and

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2452 C. C.); hence this action is brought to recover the property in kind, or its value at the price proven to be worth at the date of trial of the case, 20th February, 1863.

The law favors the real rather than the symbolical delivery, particularly in the transfer of movable property, because on general principles the mere possession creates the presumption of ownership in the possessor. In the latter case, in order to do away with this fiction of the law, all the formalities incident to that mode of tradition tolerated by the usages and customs of trade, of the nature spoken of by the witnesses, must be strictly complied with in order to divest the vendor of the possession of the thing, thereby precluding suspicion of ownership and attaching the responsibility of results on the vendee.

These fictitious transactions or modes of delivering cotton, spoken of in the testimony of Mr. E. Puech, p. 30, are also satisfactorily laid down in the case of *Campbell v. Penn*, 7 An. 372 and 373. In this case, Bradley, Wilson & Co., the vendors, sold to Simpson through their broker, Keene, 734 bales of cotton, and gave an order on Penn, the keeper of the press, to deliver the cotton to their broker, who entered the same, with its marks, in the black book of the press, without heading, that is to say, without inserting the names of vendors and vendee, purposely to avoid a delivery of the cotton to Simpson, and preventing him from receiving advances thereon until he paid for the cotton. Simpson, however, did receive advances from the firm of Campbell, Rickarby & Co., to the amount of \$24,000, and while these advances were being made, Keene, the broker, by order of Simpson, transferred the cotton, by heading the entry in the black book thus: "From Bradley, Wilson & Co., to Campbell, Rickarby & Co." and signed it. Under these facts the plaintiffs succeeded in the suit, not upon the question of the validity of the first entry, for that was without heading and incomplete to pass delivery, but upon the completion and validity of the second entry, which was in due form, definite and certain as to names of vendor and vendee, all of which was done by the instrumentality of Keene, the broker of Bradley, Wilson & Co., who already had the *indicia* of ownership vested in him by virtue of the order of delivery to him from the latter.

Hoffman, the appellants' witness, testifies that he was the superintendent of the Mississippi Cotton Press, and that in the present case he was directed by the appellant "to weigh to order" 18 bales of cotton. This direction or order, if in writing, has not been produced; he also states that he knew not at the time of weighing who the purchaser was. We say that Hoffman, under this direction from his principals, had no power to deliver the cotton to any particular person, but to remain subject to their order. This, too, is to be inferred from the manner in which the so-called "entry of transfer" is executed in the black book. First, it is not signed by Hoffman, who made the entry. Underneath this entry is noted in lead pencil the words "to be sold by B. N. & Co., for account of buyer." This portion was unauthorized and illegal, and stands as unwritten, and forms no part of said entry.

The names of the vendors and vendee not appearing properly written at the top or heading of this entry, in the manner usually done in tran-

sections of this kind, as proven by the two witnesses, *Messrs. Henobery and Puech*, and as laid down in the adjudicated case of *Campbell v. Penn*, is fatal to create or operate any delivery at all, nor even a constructive or symbolical delivery according to usages, much less in law, to the latter of the cotton in question. For the only legal interpretation to be given to the words "to order," and "on account of buyer," is, that the appellants had it so done purposely to suspend the delivery, and in the meantime to retain in them the control of the cotton, subject to their order. Under the condition of such an entry, had the appellants been offered a higher price for the cotton, at any time before the burning, they would have been at perfect liberty to accept it, and insert the name of any other person as vendee in the black book in place of appellee; and in that case the latter would have been without recourse as to these identical 18 bales, even admitting that they were intended for him, because there was no delivery in him.

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Therefore if such an entry is thus susceptible to two constructions, to operate constructively a delivery in both instances, and this at the discretion and pleasure of the appellants, who thus assumed control of the cotton, it is just, then, that they should be made responsible for all the results of their negligence in causing the suspension of its delivery, whose duty it was to have made clear and definite their intention on this important subject, the very essence of the contract.

Nor is there any proof showing that the appellee had been notified, according to usage, by way of an invoice, or note of weights, etc., nor that he knew of the weighing of any cotton at the press for him. Even admitting that all the entries in the books are regular and proper, still, under the unusual circumstances of this case: 1. The payment in advance; 2. No broker employed to perfect this negotiation; 3. The appellants having in the contract designated the place of delivery; all of which rendered it more incumbent upon them, if desirous to act their part in good faith, to have notified the appellee of the classing and weighing of the cotton, if intended for him. Had they done that, the transaction would have been regular and binding on the latter, but not otherwise. See Art. 1904 C. C. and notes.

It is clear, from the fact that the appellants having receive the full consideration price for 18 bales of cotton, in advance; that they no longer felt an interest in that much of the staple on hand, and naturally grew dull and indifferent as to the delivery. But having undertaken upon themselves to retain the same at the press, in a suspensive condition for nearly six weeks, was the work of their choice and risk.

In conclusion, the appellee respectfully prays this honorable court, in considering his answer to this appeal, that the judgment of the court of first instance be so amended as to allow him sixty instead of twenty-one cents, as the equivalent value per pound for said cotton, as prayed for in his petition, and proven on the day of trial of the cause to be worth more than that rate; and that the judgment so amended be affirmed, in all other respects, with costs of both courts.

Fellows & Mills for appellant.—The case in brief is this: On the 11th March, 1862, plaintiff purchased from Bellocq, Noblom & Co., eighteen

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bales of cotton, of middling quality, then lying in the Mississippi Cotton Press, in store, for which he paid an advance of \$800. This cotton was weighed by the weigher, Mr. A. Hoffman, at the order of defendants, and an entry made of the weights, and a transfer entered in the "black book": a book kept by the press for the purpose of entering therein all transfers of cotton from vendor to vendee. On the 25th of April, 1862, one day previous to the arrival of the United States ships of war in front of the city, this cotton was taken out of the press to be burned, by order of the Confederate authorities, together with the greater part of the cotton in the press. Four bales of this lot were saved by the exertion of some one, and returned to the press. Some time after this, about the 11th June, plaintiff made a demand upon Mr. Noblom, one of the defendants, for the eighteen bales of cotton he had purchased some four months previous. To this demand defendant responded, "that he had received from Seris eight hundred dollars on account of the cotton, that it had been weighed, and that there was an overbalance due on the cotton to his firm, but that he could take the four bales."

These are the main facts in the case, and the question at issue is, whether the weighing of cotton and its transfer upon the black book is a delivery? It is submitted that, in the case of *Campbell v. Penn* (7 An. 371), this honorable court ruled that the transfer in the black book alone constituted a delivery. The learned judge, in his opinion, says: "Bradley, Wilson & Co. had, or by their agent, placed the whole of the cotton in possession of their vendee, though only symbolically on the black book of the press. It seems so well established by the usages of trade, that we could not resist, however much disposed to favor real rather than fictitious transactions."

How similar is the case at bar? Bellocq, Noblom & Co. sold to Seris this cotton; it was weighed at their order, transferred on the pages of the black book, and yet Seris pleads it is no delivery. The testimony of the weigher, Mr. Hoffman, who has been engaged for many years in this business, and who is thoroughly conversant with the usages of the trade in these transactions, shows plainly that the passage of the cotton through the scales is considered a delivery, as is also the transfer in the black book. He says: "At the time, weighers seldom know the purchaser; so soon as the cotton is passed through the scales it is considered delivered, and is at the risk of the buyer, and never before. I never knew of any variation from that rule. I have been in my present business about sixteen years in this city."

Here we see plainly perceptible a tacit understanding that, after the weighing, the cotton is at the risk of the buyer; and it is not until three months after this that the plaintiff claims the cotton, as though he was ignorant of his ownership, or its almost total destruction. Is it natural or reasonable to suppose that Seris, after paying eight hundred dollars for this cotton, would wait three months for its delivery, he being a poor man?

It is submitted that, in the case of *Larue v. Rugely, Blair & Co.* (10 An. p. 242), the decision of the learned judge plainly shows that even the turning out of cotton to be weighed is a lawful delivery. He says: "Defen-

ants sold to plaintiff a lot of cotton, and gave plaintiff's broker an order on the press for its delivery. A few days afterwards plaintiff paid \$3,000 on account of the purchase, and the cotton was destroyed by fire, but before the pressmen had turned out the cotton to be weighed: *Held*, That there was no delivery such as to put the cotton at the risk of the purchaser."

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Is there but one thing deducible from this? and is not that, that if the pressman had turned out the cotton to be weighed, it would have been a delivery? In the case at bar the cotton was turned out, was weighed, and was entered in the black book, thus making three separate deliveries, each of which would be considered as complete, according to the usages of the trade.

The attention of the court is also drawn to the "reasons for judgment," given by the honorable judge of the lower court, on the first trial. He says: "I am of the opinion, from the evidence, that there was a delivery, and that it was so considered by the plaintiff himself up to a period of time subsequent to the burning of said cotton. * * * The receipt given for the sum paid, and specifying the place of delivery, also contains the description of the particular bales of cotton sold, being the same that were weighed. It is shown that, after the burning, the small amount due on the purchase price was paid. This, and the facts that he spoke of the burning as his loss, and of the long delay after the purchase, show the light in which the plaintiff viewed the transaction." * * *

Can any one fail to discern the manner in which plaintiff carried on this transaction? Is it not plain that he considered the cotton as his property, and that his delay in removing it was for the reason that he could not find sale for it, and was but awaiting a rise in the market? Learning, some time after the purchase, that his cotton was burned, he (thinking the non-removal would aid him in claiming "no delivery") waited upon and demanded of defendant the eighteen bales of cotton, and meeting with a refusal, brought this suit.

There are, among men of business, certain natural rules, which all more or less obey in their daily intercourse with their fellow man. It is not natural to suppose that Seris, a poor man, investing almost his all in this speculation, would allow three months to pass away without discovering whether the property of the cotton was in him or not. It speaks for itself. He demanded it as his cotton, and he mourned the loss of it as his property.

It may be argued that, according to Art. 2433, C. C., plaintiff had a right to claim a delivery any time subsequent to the sale; but it is evident that the law does not extend this right but to cases in which there has been a non-execution of the contract.

There has been no evasion or withdrawal from the contract by defendants. A lawful delivery was made, and they deemed that sufficient. Attention is respectfully drawn to the testimony of the weigher, yard clerk and others, which is subjoined.

HYMAN, C. J. Defendants are sued to deliver to plaintiff 18 bales of cotton, sold by weight, or to pay damages.

Judgment was rendered in the lower court condemning defendants to

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deliver to plaintiff 18 bales of cotton, or in default thereof, to pay him \$1,690 50, as damages and cost of suit.

Defendants appealed.

On the 11th March, 1862, plaintiff paid defendants \$800 for 18 bales of cotton sold to him, at 10 cents per pound, to be delivered in the Mississippi Cotton Press, in New Orleans. On 24th April, 1862, all cotton in the press was taken out by force and nearly all burned.

Defendants proved that, on the 17th March, 1862, they ordered and caused to be weighed, in the press, 18 bales of cotton, but for whom witness did not know, and that this cotton was in the press on 24th April, 1862, and that most of it was burned.

Article 2433 of the Civil Code provides, that when goods, produce or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted, or measured; but the buyer may require, either the delivery, or damages in case of non-execution of the contract.

The weighing of 18 bales of cotton for an unknown person does not prove that they were weighed for plaintiff, and consequently they did not place them at his risk. Even did it so prove, we would not deem it sufficient to release defendants from the risk and loss, it being an *ex parte* proceeding.

Article 1909 of Civil Code provides that, if the object to be given is uncertain, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered.

There was no time agreed upon for the weighing of the cotton; and we think that it was necessary to give notice and to put plaintiff in default, as required by this article, before the cotton would be at his risk.

Defendants have invoked the custom of merchants, but they have not proved delivery, as required by custom.

Plaintiff, on appeal, has asked that the damages be increased.

Damages were assessed by the judge of the lower court, at the time that defendants were put in default.

In this he was correct. See 13 La. Rep. 229.

Judgment affirmed, with costs.

HOWELL, J., recused.

FRANCISCO SIENTES v. CHARLES ODIER & Co.

Where the judge of the court below gives judgment for the plaintiff, but makes no allusion to the plea in reconvention, set up by the defendant, it is an irregularity, and the case will be remanded.

Where threats and representations, resorted to by a party so that the other was induced to sign a lease and give his notes, which he paid for fear of suit; *Held*: That such threats as these are insufficient to rescind the contract. It is perfectly immaterial to the lessee what was the lessor's right or title to the thing leased. He got under his contract all that he could have acquired from the true owner, quiet and peaceable possession. Ownership is not essential to make a lease valid. He who lets out the property of another warrants the enjoyment of it against the claim of the owner.

A lessee sued for rent, and in undisturbed possession of the premises under the lease, cannot contest the lessor's title.

In order to entitle the payer to recover back money paid by mistake, it must have been paid to a person to whom he did not owe it. *Repetitio nulla est ab eo qui summa recepit.*

Where the object of the lease was a special one, parol testimony cannot be received to prove that the lessee had the privilege of using it for other purposes.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
H. R. Grandmont for plaintiff. C. Redmond for defendants and appellants.

LESLY, J. The plaintiff sues the defendants, Charles Odier and Louis Surgi, in the name and style of Charles Odier & Co., for the repetition of one year's rent by him paid to them, under a contract of lease, which contract, he avers, was null and void, for want of cause of legal consideration, and that he was under no legal obligation to pay the notes representing the price of the lease.

The defendants, Odier & Co. (Surgi excepting to any right of action against him) pleaded the general issue; and claimed from the plaintiff in reconvention, for rent of the same premises, from 1st October, 1856, to 1st October, 1858, an additional sum of \$533 33, with interest. The court below rendered judgment in favor of the plaintiff for the whole amount claimed, but made no allusion in his decree to the reconventional demand, which irregularity would justify the remanding of the case, did we not deem this demand rather an original than a reconventional one. See 17 La. Rep. 176; 12 La. 510.

The lease is as follows: "Be it known that we, Charles Odier & Co., farmers of the revenue of the fifth section of the port of New Orleans, do hereby lease, for the term of one year, beginning on the 1st October, 1855, to Mr. Francis Sientes, a place on the margin of the river, between the meat market and the red stores, for the purpose of keeping an oyster stand; said stand already erected and in the possession of the lessee."

The present lease is made for and in consideration of a sum of four hundred dollars per annum, payable monthly; and, to secure the payment, Mr. Sientes has furnished to Messrs. Charles Odier & Co., who acknowledge receipt, twelve notes drawn by himself to the order of and endorsed by José Rosee, and payable every month.

It is understood between the parties that, in case of non-payment of any of the said notes, the lease will become null and void, and the stand returns to Charles Odier & Co."

The lessee retained peaceable and undisturbed possession of the leased premises during the whole term of the lease, and no objection is made on

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that score. He has paid all his notes, and more than a year after the maturity of the last note, discovers that he was not legally bound to pay them; because, as he avers, the contract of lease was null and void for want of cause and legal consideration, and that it was only by the threats, representations and pretence of right, resorted to by Odier & Surgi, that he was induced to sign the lease and execute his notes, which he paid in consequence of the threats and representations resorted to by the same parties and from the fear of being sued.

The nature of the defendants' claim on the leased premises is stated in the lease, and under their right the plaintiff consented to occupy and did occupy them for the stipulated term. Upon the authority of *Bradford's Heirs v. Brown*, 10 M.; O. S. 217, such threats as those complained of are insufficient to rescind the contract.

It is perfectly immaterial to the lessee what was the lessor's right or title to the thing leased. The lessee got, under his contract, all that he could have acquired from the true owner, quiet and peaceable possession, which was fully guaranteed to him by his lessor. 2652 and 2666 C. C.

Ownership is not essential to make a lease valid. "He who lets out the property of another," says Article 2652, "warrants the enjoyment of it against the claim of the owner." Had the city, the only competent authority, disturbed the plaintiff in his possession, he might then have complained and resorted to any legal remedy for redress; but he comes, we think, with bad grace, after he has enjoyed the quiet use of the property, and voluntarily paid his notes given in consideration of the lease, to claim the repetition of the amount so paid by him; because, as he avers, the lessor was without right to the property.

On that score the door is closed to him, on the authority of *Tippett v. Tete*, 10 La. 362, in which it is held: "That a lessee, sued for rent, and in undisturbed possession of the premises, under the lease, cannot contest the lessor's title;" which doctrine is reaffirmed in *Dennistown v. Walton*, 8 Rob. 213, and *Nicholson v. Byrne*, 11 La. 173. See also Pothier's *Contract de Louage*, No. 20, Oblig. 133. This is not a suit to recover the rent, but one for the repetition of rent already paid. We subscribe to the maxim of the civil as well as of the common law: *Repetitio nulla est ab eo qui suum recepit*.

Article 2129 Civil Code, on which the judgment of the lower court is based, as well as Article 18 C. P., have no application to a case like this, in which a contracting party has got the full benefit of his contract. It is true that eventually he was evicted by the city, but it was long after the expiration of the lease for which he made payment and of which he is now seeking the repetition.

On the trial of the case, the plaintiff sought to prove by witnesses, that long prior to the written lease from the defendants to the plaintiff, the latter was already in the possession of the oyster stand mentioned in said lease; to the admissibility of which evidence, the defendants' counsel objected, on the ground that such testimony went to contradict the allegations of the plaintiff's petition, and the terms of the lease, and the objection was sustained, and a bill of exceptions tendered to and signed by the court.

It is stated in the lease that "said stand is already erected and in

possession of the lessee;" and so far as the evidence offered went to corroborate that statement, it was admissible, although unnecessary, as the contract of the parties must govern. What was the previous nature and duration of the possession held by the plaintiff might well be construed by the last clause of the contract, which says that in a certain contingency the lease will become null and void and the stand *returns* to Messrs. Charles Odier & Co. We give full effect, however, to such of this testimony as was legally admissible under the pleadings and not in conflict with the contract.

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And again: the plaintiff offered to prove by the same witnesses that, among other representations made to the plaintiff, to induce him to take the aforesaid lease, the defendants, through Surgi, told said plaintiff that he should be permitted to use the aforesaid stand for the sale of fruits, during the summer time; and this evidence being objected to, on the ground that, under the general allegations in the petition, it was inadmissible, the objection was sustained, and to the opinion of the judge thereon a bill of exceptions was tendered, and signed by him. The evidence offered for this purpose was clearly inadmissible, as the plaintiff, in his petition, states that the object of the lease was a special one: the keeping of an oyster stand.

This suit was instituted also against Louis Surgi, as one of the partners of the firm of Charles Odier & Co.; but proceedings against him seem to have been dropped, as his exception to plaintiff's cause of action was not disposed of, nor was there any default taken against, or answer filed by him. In what capacity, if in any, he assumed to act for the defendants, the record does not inform us; but, if he was their agent, as it is contended he was, his observations and conduct, previous to the signing of the lease, can have no effect in this case. As to the alleged threats, it has been already shown that they would be no ground for rescinding the contract; and, as to his promise that, in case it would turn out that the plaintiffs had no right to exact that amount from him, it would be refunded to him, the result of this case exonerates the defendants from that conditional promise, of which they would, in any contingency, have been absolved by maintaining the plaintiff in the quiet and peaceable possession of the leased property for the whole period of the lease.

Viewing this case in all its aspects, we think the plaintiff has failed to sustain the correctness of the judgment of the court below, which must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be annulled, avoided and reversed, and that judgment be, and it is hereby rendered in favor of the defendants, and against the plaintiff, with costs in both courts; and it is further ordered, that the right of the defendants, on their claim set up in reconvention, be reserved to them.

(An application for a rehearing was made, but seven judicial days having elapsed it could not be granted.)

STATE, on the relation of CHARLES BIENVENU, v. S. WROTNOWSKI, Secretary of State.—ALFRED SHAW, Sheriff, Intervenor.

An exception that there was a misjoinder of parties and relators; that the petition shows no interest in, or cause of action on the part of either relator; and that the petition does not set forth and state such a case as would authorize the court to issue a *mandamus*, was properly overruled by the court *a quo*.

By the Court.—*Mandamus* is necessarily a summary proceeding, and it is very questionable whether, in such a case, the intervention of third persons can be legally maintained.

Where the issuing of this writ would not be consonant with right and justice, or would serve no just or useful purpose, it should not be granted.

The words of a law are generally to be understood in their most known and usual signification, without attending to the strictness of grammatical construction so much as to their general popular use.

The Secretary of State cannot go behind commissions officially presented to him for authentication.

Neither will this court go behind a commission to inquire into the evidence on which it was issued. It is the duty of the Governor to fill vacancies. In elective offices he cannot remove an incumbent; but the appointment to fill a vacancy does not operate a removal of the previous incumbent, because no removal can so be made; the office is vacant, or it is not vacant; if it is vacant, it is properly filled by the last appointment; if it is not vacant, the first incumbent cannot be disturbed.

A PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. Geo. S. Lacey* and *A. P. Field* for relator. *B. L. Lynch, Attorney General*, for the State. *L. Madison Day* for intervenor. *E. Hiestand* for *Wrotnowski*.

L. Madison Day for *Shaw, intervenor*.—Any one having an interest may intervene. C. P. 390.

The court cannot refuse the intervention. C. P. 394.

In *Tapping on Mandamus*, (3 Law Library, 6th series, 350,) [302,] it is said: "The court will, in general, allow all those against whom the rule *nisi* has been granted, or upon whom it has been served, or have had notice, or who are legally interested in the question, to show cause."

Mr. Shaw's right of intervention is, therefore, undoubted.

2. Writ of *mandamus* is addressed to a party directing him to perform some certain act belonging to the place, duty or quality with which he is clothed. C. P. 829.

Writ never issues to officer charged with a public duty, to do any act where law vests him with a discretion. 2 L. R. 395-6; *Tapping on Mandamus*, 12, 13.

Secretary of state is only required to authenticate official, that is, legal acts.

There is a discretion in the court to grant or refuse the *mandamus*, according to the justice of the case, as it shall be made to appear by the facts in the return to the alternative writ, even in the case of a mere ministerial act. *Waldron et al. v. Lee*, 5 Pick. 329.

And if upon the return it appears that the act which party required to be performed is illegal, or not required by law, the court will refuse the *mandamus*. *Ib.*

"A *mandamus* may sometimes lie against a ministerial officer to do some ministerial act connected with the liabilities of the government, yet it must be where the government itself is liable, and the officer himself has improperly refused to act." 11 How. 289, 272.

"It must even then be in a case of clear, and not doubtful right." *Kendall v. United States*, 12 Pet. 525; *Life and Fire Insurance Company v. Wilson's Heirs*, 8 Pet. 291, *Ib.*

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"A *mandamus* will not lie against a secretary, unless the laws require him to do what he is asked in the petition to be made to do." 11 How. 289.

Now, what law requires the secretary of state to authenticate the illegal and unconstitutional act of removing the sheriff, and the appointment of a new one?

"Again, a *mandamus*, as before intimated," says the Supreme Court of the United States, is only to compel the performance of some ministerial, as well as legal duty. *Kendall v. United States*, 12 Pet. 524; *Rez v. Water Works Company*, 1 Nev. & Perry, 439, 11 How. 290.

If, then, the authentication by the secretary of state were a mere ministerial act, where is the law or legal duty requiring him to authenticate an unconstitutional act, as we will show the appointment of the relator to be?

The jurisdiction of the court to command the execution of the particular act or duty, the subject of the writ *must be clear*, otherwise it will not interfere." Tapp. on *Mandamus*, 11.

"The application for this writ," says Mr. Justice Clayton (3 Smedes & Mar. R. 712), "is addressed to the sound legal discretion of the court, and it will not be awarded to enforce the performance of an act which is *contrary to law*. Cowen, 502; *Waldron v. Lee*, 5 Pick. 329."

The same rule is laid down in Tapping on *Mandamus*, 16.

"The applicant must not only show that he is legally and equitably entitled to some right properly the subject of the writ, but must show that it is legally demandable from the person to whom such writ must be directed, otherwise the court will refuse to interfere." Tapping on *Mandamus*, 29.

Tested by these principles and authorities, the *mandamus* must be refused in this case; and this especially, as Shaw has intervened.

For the appointment of the relator to the office of sheriff is unconstitutional, illegal and void.

Under the constitution of 1864, Art. 84, the governor can only appoint a sheriff in case of a vacancy "subsequent to an election" for a sheriff.

And by Art. 150, Mr. Shaw and all others in office at the time of the adoption of the constitution were continued in office until "the organization of the government under this constitution, and the entering into office of the new officers to be appointed under said government," etc.

Now, under Art. 84, a sheriff is to be elected.

How, then, could Mr. Shaw be removed and Mr. B. be appointed, without a violation of the constitution?

No power can be derived from Arts. 54 and 55 of the constitution.

Neither of these articles give any power to appoint a sheriff.

The power to make such an appointment is derived solely from Art. 84, and which can only be done in the solitary case of a vacancy, subsequent to an election. See 20 Barb. 307.

There has been no election for sheriff, and, as we have said, Mr. Shaw, under Art. 150 of the constitution, was continued in office until his office was filled by an election.

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For it is not in the power of the governor to remove Mr. Shaw, and by his own act, create a vacancy. 9 An. 237. See 2 Scam. R. 74. 20 Barb. 307.

The executive can only exercise such power as is clearly granted by the constitution. 2 Scam. R. 79.

"Where a claim of power is advanced by the executive, the question is whether it has been granted to the executive, and if the grant cannot be shown he has no title to the exercise of the power." *Ibid* 81-2.

Has any grant of power been attempted to be shown in this case for the removal and appointment of a sheriff? None whatever. The application, then, for a *mandamus* must fail.

For, as is well said in the case in 2 Scam. R. 82: "As the right of the governor to remove * * * must be granted by the constitution, or it does not exist, it therefore devolves upon those who advocate the claim of the executive power, to show the grant upon which it is founded, to point out the clause and section of the constitution from which it is derived."

This principle is conclusive against relator's pretensions, as no grant of power or authority for his appointment has or can be shown.

Such being the case, the secretary of state will not be ordered to contribute to an illegal act. 3 Smedes & Mar. 712.

For the secretary's duties are prescribed by law, and he is bound to conform to law and not to the will of the executive. 2 Scam. R. 93-4; Brees Rep. 68.

The governor, then, having no power to appoint the relator, the petition must be dismissed.

And, in conclusion, allow us to say that it has been expressly decided that the secretary of state will not be compelled by *mandamus* to authenticate an act of the governor which is unconstitutional. Brees (Ill.) R. 68.

LSLEY, J. On the 14th May, 1865, the Sixth District Court of New Orleans granted its mandate, ordering Stanislas Wrotnowski, secretary of state, to affix his official signature and the seal of his office to the commission signed and issued by James Madison Wells, Governor of the State of Louisiana, under date of 1st May, 1865; or, in default thereof, that the said Wrotnowski show cause to the contrary, on Monday, the 11th May, 1865.

On the day last mentioned, Wrotnowski excepted to the petition of the relators, on the following grounds:

1. That there was a misjoinder of parties, relators, in said case.
2. That the petition shows no interest in, or cause of action, on the part of either relator.
3. That the petition does not set forth and state such a case as would authorize the court to issue a *mandamus*.

This exception was properly overruled by the lower court.

On the 18th of the same month, Wrotnowski filed his answer to the relator's petition, and therein averred for reason why a peremptory *mandamus* should not be issued against him, as prayed for by the relators, that the commission referred to in the said petition was utterly null and void, and of no force, effect or validity whatever, because attempted to be issued by the governor without any warrant of law for so doing, and in direct violation of the constitution and laws of the State; that he can not

be compelled to lend the sanction of his name as secretary of state, by countersigning such illegal commission and affixing the great seal of state thereto; that the office of sheriff of the parish of Orleans has been held since March 16, 1864, and is now held, under a commission issued in pursuance of the laws and constitution of the State of Louisiana, by Alfred Shaw, which commission does not expire until the next regular election for sheriff, and that the governor is without any authority to supercede the said Shaw, as sheriff aforesaid, by the appointment of the relator, and he prayed that the application of the relators for a peremptory *mandamus* be refused.

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This answer contains all the reasons why Wrotnowski refused to authenticate, with his official signature and seal, the commission issued in favor of the relator, C. Bienvenu.

Previous to the filing of this answer, Alfred Shaw, by permission of the court, intervened in the proceeding, setting forth substantially the same grounds as those subsequently urged by the secretary of state, and praying for the same relief; and further averred, in order to vest this court with jurisdiction, that his interest in the controversy exceeded the sum of three hundred dollars; which fact, by a supplemental answer, was also averred by Wrotnowski.

The relators moved to dismiss the petition of intervention, because Shaw showed not the least right to intervene in the case pending, and this motion was reserved and overruled in the final judgment rendered by the court below.

Mandamus is, necessarily, a summary proceeding; and it is very questionable whether, in such a case, the interventions of third persons can be legally entertained, obstructing, as they must, therein the avenues of justice; particularly, too, in a case involving, like this one, grave and important questions of great public interest.

The late court, in *Chambliss v. Atkinson*, 2 A. 490, in a summary proceeding, pronounced an intervention a derogation of common right, unauthorized by law. In *Tapping on Mandamus*, referred to by defendants (3 Law Lib. 6th series, 350, 302), it is said: "The court will, in general, allow all those against whom the rule *nisi* has been granted, or upon whom it has been served, or have had notice, or are legally interested in the question, to show cause." The term, in general, presumes exceptional cases excluded from the rule, and one like this would fall within the exception, if such a rule had any binding effect on the courts of this State, which is controlled by its own rules of practice, by which interventions are permitted in ordinary suits, but not in summary proceedings.

It is not, however, necessary to pass now on that point, because it is immaterial who figure as parties herein, as there is but one issue on which the question must be decided.

Divested of all extraneous, superfluous and irrelevant surroundings, what is the real question to be solved? We apprehend it to be this: Is the secretary of state, under the constitution and laws of the State of Louisiana, a mere ministerial officer, as regards the authorization by him of official acts; or is he, under the constitution and laws, vested with a discretionary and supervisory power, which enables him, before executing the functions by law imposed on him in this particular, to judge for

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himself whether such official acts as need his ministry are constitutional or unconstitutional, legal or illegal, and to affix or withhold from such acts, at his option, according to his discretion, his official signature and the impress of the great seal of the State?

If the first of these theories, which is the one contended for by the relators, be the correct one, then the remedy prayed for by them should be accorded. But, if the issuing of the writ would not be consonant with right and justice, or would serve no just or useful purpose, the mandate should not be granted.

We have been greatly assisted in the investigation of the very important and interesting questions submitted for our decision by the elaborate researches and the able arguments of counsel representing the different parties litigant.

The first question, the one that lies at the foundation of this controversy, and which, in its order, should be first considered, is whether the secretary of state could legally go behind the commission issued by the governor, in due form, to *Bienvenu*, and examine into the facts upon which the executive action was predicated?

To this end, we must examine our own laws, in preference to those of other States, to ascertain what are the duties that devolve by law on the secretary of state. He is a constitutional officer, as are the treasurer, the auditor and sheriffs; and he belongs to the executive branch of the government. See Art. 62, tit. 1, Constitution of Louisiana.

His duties are defined by law. Art. 62, § 1 Const. See acts of 1855, No. 273 and No. 281, which latter statute enacts that there shall be a public seal, for authenticating the acts of the government, and that the secretary of state shall be the keeper, and shall affix this public seal to *all* official acts, the laws alone excepted. See sections 1 and 2.

The law is imperative in its command. The secretary of state *shall* affix the public seal to *all* official acts.

It becomes, then, important that the word official should be clearly defined. Is it necessarily used in a sense synonymous with the word legal? Is the ingredient of legality an essential concomitant in defining the word official?

It is laid down, in Article 14 of the Civil Code, that the words of a law are generally to be understood in their most known and usual signification; without attending so much to the niceties of grammar, as to the general popular use of words.

Reference, then, must be had to the lexicographers for the general and popular use of the word *official*.

The best, most approved and popular English dictionaries extant are those of Worcester and of Webster, and these both concur in the signification and meaning of the word, in its English sense, regardless of the definitions of the same word in other languages. "Official," says these authors, means "*derived from the proper officer, or from the proper authority, made or communicated by virtue of authority.*"

News, though derived from official sources, may be untrue. If the authority is a competent one, all acts done by it are official acts. The issuing of a patent for land is an official act, and yet nothing may be conveyed by it, for want of title in the grantor.

The signing of a commission by the governor of the State is an official duty imposed on him by the constitution ; it emanates from the executive authority, and is issued from the proper office. Art. 66 tit. 4 Const.

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The governor is by the constitution vested with the exclusive power to make some, and, under certain contingences, other official appointments, and such appointments are official acts. Arts. 54 and 55, tit. 4 Const.

He must determine for himself from information communicated to him, when appointments become necessary ; but he is under no legal obligation to communicate either to the secretary of state, or to any one else, upon what information he acts.

The secretary of state is not to suspend his action to enquire why and wherefore any appointment by the governor is made.

His duty is plain : he is not directed, but ordered by law, to perform it. When commissions from the governor need authentication, he shall affix his official signature and the public seal of state, for these are official acts. Whatever improvidence or illegality there may be in the issuing of commissions, that concerns not him. His authenticating any official act can never compromit him ; for he has no discretion to exercise regarding it.

It is the duty of the governor to fill vacancies. In elective offices he cannot remove an incumbent ; but the appointment to fill a vacancy does not operate a removal of the previous incumbent, because no removal can so be made ; the office is vacant, or it is not vacant ; if it is vacant, it is properly filled by the last appointment ; if it is not vacant, the first incumbent cannot be disturbed. What injury, then, could by any possibility result to the first incumbent by the new appointment, if it were illegally made. It would be to him *damnum absque injuria*.

Were this right of supervision, which is almost equivalent to a veto power, in the secretary of state, as it is seriously contended it is, it would, indeed, produce startling consequences. The secretary of state could *paralyze* at will constitutional appointments made by the executive. He, and not the governor, would control appointments or nullify them ; and this, indeed, according to the doctrine of the intervenor's counsel, is what the constitution contemplated ! By way of illustration, one of his counsel depicts the evil which would flow from reposing too much power in the executive, who, if he were despotically inclined, might, if he were unchecked by the secretary of state, appoint a new set of judges to contest the seats on this bench of the present constitutional incumbents. Such an event, it is true, would not be beyond the reach of possibility ; but what injury could result from such illegal executive action ? But, reverse this case, and suppose that the secretary of state, in the exercise of his pretended discretion, had refused to authenticate the commissions of the present incumbents, what legal means, without a supreme court, would exist of ascertaining, in the last resort, the legality of such a refusal ? and how could this very case now before us have been finally disposed of ?

Another example, by way of illustration, suggested by the relator's counsel, to show the impolicy of any such controlling power in the hands of the secretary of state, is not altogether inappropriate :

A criminal, on the eve of execution, is reprieved by the executive ; but

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the official act of reprieve needs authentication at the hands of the secretary of state, who, in the exercise of his discretion, withholds it.

This discretionary power, so fatally exercised, might be eventually ignored by the courts ; but, in the interval, the culprit is hung.

If illustrations like these, although presented by counsel in argument, are out of place here, they may have and probably did present themselves to the legislative mind, when the secretary of state was ordered to authenticate all official acts.

The counsel for the defendants placed great reliance on a decision rendered by the Supreme Court of Illinois, in the case of *The People on the relation of Wm. L. D. Ewing v. Forquer*, reported in the 1st vol. of Breese's Illinois Reports, p. 68.

An extract from that decision will suffice to show what was the point therein at issue. It was on a motion for a *mandamus* on the relation of Wm. D. Ewing, who took out a rule on the secretary of state, requiring him to show cause why a *mandamus* should not be awarded against him, requiring him to countersign and seal a commission appointing the relator paymaster-general of the state.

The judge who delivered the opinion said : "The office had been vacant since 1821, and yet, I am not aware that any complaint had ever been made. I therefore come to the conclusion that the lieutenant-governor, admitting him fully clothed with all the functions of governor, had not the constitutional power to fill the vacancy in the office of paymaster-general. This conclusion would seem to settle the question whether the *mandamus* ought to be awarded or not. But the relator's counsel contended, in the argument, that whether the lieutenant-governor had the constitutional right or not to make the appointment, still, the secretary was compelled to countersign the commission and affix the seal.

Can this proposition be sustained ?

By the 4th section of the act, defining the duties of secretary of state, it is enacted : "That all commissions required by law to be issued by the governor, shall be countersigned by the secretary of state." Had the legislature intended to require the secretary to countersign every commission that the governor should present to him, whether authorized by the law or the constitution, its phraseology would have been that the secretary should countersign every commission presented to him by the governor. The secretary is, however, *only* required to countersign those commissions required to be issued by law. Must he then look into the law to see if the commission is required by law ? Would he be required to sign a commission for an office that does not exist ?

The secretary of state is a constitutional officer, as well as the governor, and his duties are pointed out by law. I think he may refuse to sanction an unconstitutional or illegal act. Should I, however, be wrong in this opinion, still the court might well doubt the propriety of granting a *mandamus*. If the lieutenant-governor had not the power to make the appointment, what benefit would the relator derive from possessing the commission ; although duly signed and sealed, would it confer the office on him ? I think not. But if any doubt rests on the subject, the court ought not to grant the *mandamus*."

We are at a loss to perceive what analogy exists between this Illinois case and the one now before us.

In the former case, a legal discretion was vested in the secretary of state. He was to authenticate all commissions *required by law*; not all official acts, and this is, in effect, what constituted the discretion vested in that officer.

The language and phraseology, says the court, would, to divest him of discretion, have applied to *every* commission presented to him by the governor.

The statute of this state requires the secretary to authenticate *all* official acts; and commissions signed by the governor appointing sheriffs, are, to all intents and purposes, official acts; and, being embraced in the comprehensive term *all*, that word is equivalent to the word *every*, which was needed in the Illinois statutes to divest the secretary of state thereof of his discretion.

This court does not entertain any doubt whatever as to the practical construction of our statute, nor of the nature of the duty of the secretary of state to give it effect. He cannot go behind commissions officially presented to him for authentication.

There is a case in 12 An. p. 719: *The State on the relation of Vienne v. S. M. Hyams*, on an application for a *mandamus*, involving a contest between an old sheriff and a newly elected one, and the court expressed therein the unanimous opinion, that it could not go behind the commission to examine the proof upon which the governor acted in issuing the relator's commission, and to reverse his decision.

When two commissions duly authenticated for the same office are extant, and it becomes necessary to determine which of the two appointees is legally entitled to the office, that issue, presented in a proper manner and at the proper time, can be entertained by the courts; but the courts will not inquisitively seek to know upon what evidence the executive acted in the performance of a constitutional duty, at all events in advance of the consummation of an official act.

This is not a proceeding in which the right to the office of sheriff, as between the conflicting claimants, is directly involved. We do not deem that question properly before us, and we decide now nothing in regard to it.

It will be time enough to do this whenever such a case is presented for judicial investigation.

A great many authorities have been referred to by the defendants' counsel to show that no useful purpose could be attained by granting the *mandamus* to the relator; and this involves the second branch of the question which we propose to solve.

There is no legal means of ascertaining upon what information or evidence the governor acted in appointing Bienvenu to the office of sheriff.

Such an appointment might, in a certain contingency, have been legally made by the executive. If a vacancy occurred it was his duty to make the appointment.

Having made it, he is presumed, as a sworn officer, to have done his duty till the contrary is shown.

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But, it is contended that the first incumbent occupies the office under a legal commission, and that, consequently, there is no vacancy.

But does this necessarily follow?

Suppose, for instance, that, when Bienvenu was appointed, the governor had in his possession Shaw's resignation, which, accepted by him officially, would certainly have created a vacancy; Shaw's commission would still be held by him, because there is no law requiring him to part with it, and he could still be performing the duties of the office under the legal requirement (see Act No. 289, 1855, § 2), until his successor was inducted into office.

Evidence like this, therefore, does not suffice to destroy the presumption of legality which flows from the performance of an official act, done by the highest executive officer of the State. And, as held in 12 A. p. 79, the court would not go behind the commission to enquire into the evidence on which it was issued.

It is the unanimous opinion of this court that neither the secretary of state nor the intervenor has shown any valid and legal reasons why the former should not authenticate the commission issued by the governor in favor of Charles Bienvenu; and that a *mandamus* is the proper remedy to oblige him to perform his duty in this particular. See Code of Practice, 829 and 832. *Hammerick v. Hunter*, 14 A. 225. *Parker v. Robertson*, 14 A. 249. As a matter of public policy, a useful purpose may be subserved by the issuing of a *mandamus* in this case. It may happily be that the performance of the duty imposed on the secretary of state will not confer on the relator any legal right to the office of sheriff; but this is no reason why the secretary of state should attempt to exercise discretionary powers where the law confers none on him, but, on the contrary, imperatively orders him to do the act required of him.

The judgment of the lower court must be reversed.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court in this case be annulled, avoided and reversed, and proceeding to give such judgment as should have been given by the court below, it is ordered, adjudged and decreed, that a writ of peremptory *mandamus* issue in the name of the State of Louisiana to Stanislas Wrotnowski, Secretary of State of Louisiana, directing him to affix his official signature and the public seal of the State to the commission signed and issued by James Madison Wells, Governor of the State of Louisiana, on the first day of May, in the year one thousand eight hundred and sixty-five, nominating and appointing Charles Bienvenu, Esq., sheriff in and for the parish of Orleans; and it is further ordered, that the defendant, Stanislas Wrotnowski, pay the costs in both courts.

VON PHUL, WATERS & Co. et al. v. POWELL & Co.

Until goods have been received and reshipped, or until the receiver had notified the eventual consignees that they would be forwarded according to instructions, they must be considered as under the control of the receiver, and, of course, liable to attachment by their creditors.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
J. Ad Rozier and Durant & Hornor for plaintiffs. *W. H. Hunt* for defendants. *C. Roselius and G. P. McPheeters* for Connolly & Co., intervenors and appellants.

HOWELL, J. Plaintiffs brought suit by attachment for the price of a lot of flour, sold by them for cash to defendants in St. Louis, Missouri, where both resided, and which was seized by the sheriff of this parish upon its arrival here. Bowker & Edmonds, of Boston, Massachusetts, intervened and claimed possession and control of said flour as the real consignees, making advances thereon and holding a large balance against the defendants, their debtors and consignors.

Judgment was rendered in the lower court in favor of plaintiffs against defendants, with privilege on the property attached, and against the intervenors, dismissing their intervention, from which the latter have appealed.

The defendants, in St. Louis, were large dealers in Western produce, which they shipped, to be sold on their own account, to various parties in New Orleans (among them *Jas. Connolly & Co.*), and to the intervenors, in Boston, by the Lake route or by way of New Orleans, in which latter case they consigned to said *Connolly & Co.*, in this city, with instructions to forward by sail to the intervenors. Upon making these shipments, the defendants drew their drafts upon the parties to whom the produce was consigned and advised them of the consignments. On 21st October, 1858, they purchased the lot of flour in controversy from plaintiffs, for cash. On the 25th, same month, they took from a river steamer the usual number of bills of lading of same, consigned to *Jas. Connolly & Co.* here, with instructions in the bill of lading addressed to the latter, to forward to the intervenors for their account. On the same day they forwarded a duplicate of said bill of lading to the intervenors, with a letter of advice enclosing the insurance certificate in their favor, and drew on them a draft for \$2,750, at 60 days, which was negotiated by them in St. Louis for their own benefit. These documents reached their destination and the draft was accepted prior to the date of the attachment in this suit, which was levied before the consignees here received the goods or bill of lading.

The question is, had the defendants, the consignors, lost control of the property when it was attached? To produce this effect, the legal possession or control must have vested in the intervenors by the transmission and receipt of the duplicate bill of lading and letter of advice and the acceptance of the draft. The bill of lading, however, received by them, was in favor of *Connolly & Co.*, who were the agents of the defendants, and not of intervenors, and who state that similar shipments had been

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countermanded by the defendants and sold here, and that they would have obeyed any instructions changing the destination of this flour. The intervenors could not, with the bill of lading received by them, have demanded of the common carrier, or other party, the delivery of the property. They knew that Connoly & Co. would take possession on its arrival in New Orleans, being the parties clothed, under the bill of lading, with the legal possession; and in accepting the draft they relied on the representation of defendants that the flour would be shipped to them from New Orleans by defendants' agents, and not upon any constructive possession in themselves, for in law there was none. The letter of advice must be controlled by the terms of the bill of lading. Until the goods had been received and reshipped by Connoly & Co., or until the latter had notified the intervenors that they would forward according to instructions, the goods must be considered under the control of the defendants, and, of course, liable to attachment by their creditors. See 3 An. 56. The case would have been very different if the intervenors had been the consignees named in the bill of lading received by them.

Judgment affirmed, with costs.

F. WICHTRECHT v. L. & S. FASNACHT.

Masters and employers are answerable for the damages occasioned by their servants and overseers in the exercise of the functions in which they are employed.
The Article 522 C. P. is directory, and a substantial compliance with its provisions will be sustained, if the verdict is not objected to at the trial by the defendants.
Where no interest is given by the verdict the judgment should give none.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
G. Schmidt for plaintiff. *C. E. Schmidt* for defendants and appellants.

HYMAN, C. J. Plaintiff claimed judgment for damages caused to him and his minor child, Henry, by defendant's driver.

There was a jury trial, and a verdict given of \$500 for the father, and of \$4,000 for the child.

The district judge rendered judgment for these amounts, and, besides, decreed that defendants pay legal interest thereon to plaintiff, from 15th May, 1860.

Defendants, failing to obtain a new trial, appealed.

In this court it is not contended by defendants that the damages allowed are excessive; but they contend that the driver was not their employee, and that they are not liable for his acts.

It appears from the evidence that defendants are brewers of beer in New Orleans; that they employed certain men, and furnished them with

their horses and wagons, to haul their beer about the city and sell it for them.

These men hired (defendants not objecting) other drivers, whom they paid.

Albert Erath, one of the persons employed by defendants, and a driver named Charley, were together on a beer wagon of defendants; and one of them, while driving, through carelessness and gross negligence, drove over the child, broke both of his legs, and crippled him for life.

It matters not whether Erath or Charley drove over the child, or who hired or paid Charley.

Both, when the act of damage was done, were accepted employees of defendants, and were discharging the duties of their employment.

Defendants are answerable for damages thus occasioned. See Civil Code 2299.

Defendants further contend, that the verdict of the jury is not in the form of words required by the 522d Article of the Code of Practice.

The words used by the jury in rendering their verdict were: "We agree to give to." To comply strictly with the article they should have said "Verdict for." This article is directory, and a substantial compliance with its provisions will be sustained, if not objected to at the trial, as defendants might have done. See 9 La. 410; Code of Practice, 528.

The only error in the judgment of the lower court is the allowing interest to plaintiff, none being given by the verdict. The judgment should be pursuant to the verdict of the jury. See Code of Practice, Art. 541; 4 An. p. 6.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that there now be judgment in favor of plaintiff, condemning defendants, *in solido*, to pay plaintiff five hundred dollars, for himself, and four thousand dollars for his minor child, Henry, and the costs of suit, except the costs of appeal which must be paid by plaintiff.

MRS. LOUISA H. WHEELER v. J. C. STEWART.

Where no evidence appears on the face of the record to show why a rule taken to set aside an injunction against an order of seizure and sale should not be made absolute, the judgment of the lower court to that effect will be affirmed.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. J. A. Maybin for plaintiff*.—On motion to dismiss the appeal, the transcript not having been filed within the time prescribed by law.

The appeal, if filed on the third judicial day, will be in time, otherwise

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it will be dismissed. 5 N. S. 192; 8 N. S. 184; 4 L. 68; 3 L. 251; 5 L. 348; 7 L. 344; 10 L. 500, 503; 5 A. 31; 2 A. 769; 3 A. 226; 5 A. 42, 716, 744; 6 A. 274; 9 A. 65, 538 and 21; 15 Am. 712. All these cases sustain the principle rigidly, that within three judicial days after the return day, the transcript must be filed.

Where appellant (the transcript having been completed on the last judicial day) goes in the evening to file it, but finding the office of the clerk closed earlier than usual, and having searched for the latter in vain, does not file it until early the next day, the appeal, on motion of one of the appellees, will be dismissed. Nothing showing that the office was not open as usual during business hours, at the time of day when the attempt to file the transcript was made, the presumption is that it was after business hours, and that appellant's failure was his fault. *Buckley v. Lacroux*, 14 A. 29.

The appeal in this case was returnable on the fourth Monday of December, 1861. The first judicial day was January 13th, 1862, and the court sat on January 14th and 15th, 1862, thus making three judicial days after the return day, and the record was not filed till January 20th, 1862.

The motion to dismiss the appeal, because the transcript was not filed in time, is not required to be made within three judicial days after filing the record. *Dwight v. McMillen*, 4 A. 350. 10 A. 75, *McDonogh v. De Gruys*, where the motion was made several months, after the three judicial days.

ILSLEY, J. This was a proceeding *via executiva*, sued out of the Second District Court of New Orleans by the plaintiff against the defendant, to recover the amount of two mortgage notes.

The defendant filed an opposition to restrain proceedings under the order, because, time having been granted to the debtor by the creditor, they were premature.

An injunction issued as prayed for.

Judgment was rendered on a rule taken by the plaintiff on the defendant to show cause why the injunction should not be dissolved, making the said rule absolute, dismissing the injunction, and ordering the seizure and sale against the hypothecated property to be proceeded with according to law.

No evidence whatever was adduced by the defendant and appellant to sustain his opposition, and we see no error whatever in the judgment of the court below.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be affirmed, and the appellant pay the costs of this appeal.

BERTRAND SALOY *v.* J. L. GUBERNATOR et al.

Where the note sued on bears eight per cent. interest, and the judgment below is for the same rate of interest, no damages will be accorded as for a frivolous appeal.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
E. Cambray for plaintiff.

JONES, J. This appeal is evidently taken for delay; but, as the note upon which the judgment is based, as well as the judgment itself, allows eight per cent. interest, we do not feel authorized to allow damages as for a frivolous appeal.

Judgment affirmed, with costs.

OSBORNE & TOLLE *v.* POWELL & Co.

A party cannot recover judgment on notes not yet due at the time of filing the petition, unless the affidavit is made in conformity to law.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Durant & Hornor for plaintiffs. *W. H. Hunt* for defendants.

HOWELL, J. This is an attachment suit which was consolidated and tried with that of Von Phul, Waters & Co., against same defendants, just decided.

Plaintiffs sue for \$3,425; and in a supplemental petition set forth that, at the date of instituting their suit, only the sum of \$1,925 was due, the balance of the original claim consisting of two notes, endorsed by them, not then due. For this sum of \$1,925 they obtained judgment against the defendants, with privilege, and against the garnishees, James Connoly & Co., who intervened and claimed a preference for a general balance against the defendants.

Connoly & Co. appealed, and plaintiffs join in the appeal, and ask that the judgment be awarded so as to allow the whole amount of their claim. Powell & Co. are made parties to the appeal.

On 30th October, 1858, when this suit was instituted, intervenors' account current with the defendants showed \$84,872 28 to the credit, and \$86,258 81 to the debit of the intervenors, making a balance, in their hands, in favor of defendants, Powell & Co., of \$1,386 53. Besides this, they have the sum of \$665 20 net proceeds of 123 barrels of flour, per steamer S. Decatur, which they say is claimed by Bowker & Edmonds, of Boston, making \$2,051 73 the actual sum in their hands. But a lot of

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160 barrels of flour, per steamer Michigan, consigned to them, was sold by the sheriff, in this suit, the proceeds of which are \$585 60, as stated in said account of intervenors. The total amount, therefore, of the proceeds of the consignments by the defendants, Powell & Co., to the intervenors, Connoly & Co., is \$2,637 33, as found by the lower court, and is subject to the attachment of the plaintiffs; and, consequently, the intervenors are not entitled to a judgment in their favor for any sum. The three items in their account, not allowed by the lower court, were properly rejected. They had in their hands a larger amount of money than the defendants owed them, and cannot claim interest on the debit and not allow it on the credit side of their account; and it is not shown how the other two items, for general average, originated.

The plaintiffs made a witness of one of the defendants, who testifies that, on 28th October, 1858, the defendants paid plaintiffs, in St. Louis, the sum of \$146 68 on account, which is not credited in the bill sued on; and which must be deducted from the amount for which judgment was rendered in their favor. They cannot recover judgment in this suit on the two notes, not due at the filing of their petition, as the affidavit made by them is not in the form required in such case.

As the sheriff has in his hands \$585 60, proceeds of property attached and sold at the suit of plaintiffs, this amount should be paid to them by said officer and not by the garnishees, and require the latter to resort to the sheriff for it.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be reversed, and that plaintiffs, Osborne & Tolle, recover of defendants, Powell & Co., *in solido*, the sum of \$1,778 32, with legal interest from judicial demand, costs of suit in lower court, and privilege on the property attached, and without prejudice to their right of action on the two notes set forth in their amended answer. It is further ordered, that, in part satisfaction of this judgment, they be paid by the sheriff the sum of \$585 60, proceeds of 160 barrels flour, sold in this suit on 15th November, 1858, by said sheriff. It is further ordered that the demand of intervenors be dismissed, with costs, and that plaintiffs have judgment against James Connoly & Co., garnishees, *in solido*, for the balance of the aforesaid sum of \$1,778 32, to wit: \$1,192 72, with legal interest from maturity of this judgment; and it is further ordered that the plaintiffs and appellees pay the costs in this court.

ELIZABETH MENDEZ et al. v. BAPTISTE DUGART.

Where a road, once dedicated to public use, has since ceased to be used for public purposes, and is not required by front proprietors thereon, its soil reverts to the owners.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
C. Dufour for defendant and appellant.

D. Augustin for plaintiffs.—The heirs, Dumas and Elizabeth Mendez, claim the soil of Highland road as their property, on the ground that the defendant and appellant has, by his own act, rendered useless and impracticable the servitude of passage through the said land by fencing it up and inclosing the same. C. C. Art. 780.

Servitudes are extinguished when they can no longer be used.

The soil of the road is returned to the owner as it ceases to be applied to some public purpose. C. C. Art. 474, 449.

Grantor reserved the fee in the soil. United States Digest, 1858, p. 180, § 152.

The public have the right to perfect and maintain their right of free passage, but beyond this, the rights of the owner of the soil remain unimpaired. United States Digest of Decisions, vol. 10, p. 639, § 9.

Where a private way over land of the plaintiff has been used for a long period by defendant, but has become unnecessary to him as a way, and he has obstructed it, the easement is relinquished. U. S. Digest, vol. 8, p. 589, § 77.

Places left vacant on the plan of a town are not considered as dedicated in consequence of that fact alone. Hennen's Digest, p. 1587, § 12; 7 Annual, 499, *Xiques v. Bujac*.

Those only can accept a dedication who are clothed with the authority of the sovereign. 7 An. 270.

To be perpetual, servitudes must be so expressed in the title. C. C. Art. 715.

Donation must be made by authentic act. C. C. 1523.

It is binding only when accepted and notified. C. C. 1527.

The soil of the road belongs to the original owner, and reverts to him when it ceases to be applied to a public purpose. C. C. 474, § 2; C. C. 654, 780, 723.

"The roads old and new, in this State, are generally what are denominated in the Code, public roads; hence, it by no means follows, because a road is a public road, that the public has any right to the soil after it has been abandoned." *Hatch v. Arnault*, 3 An. 482.

This Highland road never figured upon any city plan adopted by the city council.

The plan of the city must show the destination and appropriation of lots to public uses and as public places, in order to imply a promise on the part of the original owner of the soil and founder of the city, that the lots shall always remain open for the use of the public. *De Armas v. The City of New Orleans*, 5 L. p. 132.

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Servitudes are extinguished when they can no longer be used. C. C. Art. 780.

In the case of *Bernard Murigny v. Pontchartrain Railroad Company*, 15 An. p. 427, the Supreme Court has pointedly settled the doctrine as applicable to the present case: "That when a party entitled to a servitude has, by his own act, rendered that servitude impracticable, his right becomes extinguished and the transferrer is entitled to receive back the land free from the servitude created thereon."

The surveyor, D'Hémécourt, in his testimony says, "that since the opening of the streets in that vicinity, between Esplanade, Hospital, Barracks and Johnson streets, the streets so opened have cut up this Highland road in many places; and since the opening of these streets, this Highland road is of no possible use to persons living either on Bayou road or Esplanade street, or to the public at large.

It used to be a front passage, and by cutting it up and opening the streets, it became a rear passage."

It becomes self-evident that the appellant, by his own act of closing up this passage, on the whole extent of his lots, 183 feet and seven lines by 45 in breadth, has clearly demonstrated the inutility of the servitude of way established by Elizabeth Mendez and Thomas Dumas, which is further demonstrated by a similar course pursued by all the purchasers of lots on Highland road. Dorville says: "Where this Highland road stood is all built up and closed." This illegal conversion by the appellant, and his persistence therein, in spite of the letter delivered to him by the counsel for the appellees, in June, 1860, requiring him to remove the obstructions by him placed in that passage, constitutes a trespass for which the court below has mulcted the appellant in the very moderate amount of six dollars per month. A very poor retribution for such a flagrant violation of appellees' rights.

The title to the soil of the road was never relinquished by the appellees.

Abandonment of the title to land must be made in writing. 4 A. 172.

Where streets are laid out and dedicated to public use, they do not become public highways without being accepted as such by the proper authority. Putnam's U. S. Digest of Decisions, vol. 8, p. 589, § 74.

HOWELL, J. This is a petitory action, in which the plaintiffs, Elizabeth Mendez and the heirs of the late Thomas Dumas, claim the ownership of two tracts of land, forming a part of a piece of ground in the Second District of this city, styled the Highland road, running from Bayou road to Canal Carondelet, between Johnson and Galvez streets, of which two tracts, they allege, defendant has taken illegal possession; they allege, also, that said strip of ground was a part of a larger tract of land owned by their author and themselves, and was reserved as a road of ingress and egress to the said Canal Carondelet, and that they have never been divested of the legal ownership; that the lots sold to the author of defendant were sold to front on said Highland road; that, since the streets have been laid off in that vicinity by the city of New Orleans, said lots of defendant now front on Galvez street, making said Highland road no longer necessary as a passage, and that, consequently, the soil thereof is returned by law to them as owners.

The other plaintiffs, as heirs of the late Joseph Castanedo, claim a servitude of passage, granted in 1806 by the then owner.

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The defendant pleads the general issue, denying that plaintiffs have any cause of action, and makes the following assignment of errors :

1. Those of the plaintiffs who claim by right of servitude are barred by prescription.

2. Those of said plaintiffs who claim ownership are shown by the evidence to have divested themselves of all such rights by making the road a *locus publicus*.

3. The plaintiffs have no interest to stand in judgment in the matters herein involved, and therefore cannot be heard.

We are of opinion that the heirs of Castanedo have not shown a right to stand in judgment as against defendant.

The other plaintiffs, Elizabeth Mendez and the heirs of Dumas, have introduced the original title to the tract of land, comprising within it this Highland road, and under the provisions of our law, and as the road has long since ceased to be used for public purposes, and is not required by the defendant and other purchasers fronting thereon, its soil reverts to them as owners. C. C. 474, 654. 3 A. 482.

The alleged dedication by the plaintiffs of this road, in selling lots fronting thereon, was not such as to divest them of the property in the soil so reserved.

The defendant evidently has no right to the ground in question, his title showing that he bought lots fronting on said road ; and, as to him, the plaintiffs have shown a good and sufficient title to the property.

We think, however, the district judge erred in decreeing a title to the defendant upon paying a certain sum. The ends of justice will be met in decreeing the plaintiffs to be the owners and entitled to the possession of said land, reserving all other rights for further adjustment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, and that plaintiffs, Elizabeth Mendez and the heirs of Thomas Dumas, be decreed to be the owners of the property described in their petition and known as the Highland road; and that they be put in possession thereof. It is further ordered, that the defendant, Baptiste Dougart, remove the fences and improvements thereon within thirty days from the maturity of this judgment, or, in default thereof, that plaintiffs have them removed at his cost. It is further ordered that the rights of servitude, of rent and of damages, be reserved to the parties annually; and it is finally ordered, that the costs of the lower court be paid by the defendant, and the costs of appeal be paid by the plaintiffs and appellees.

P. H. BRENTON, Syndic, v. MADAME JEAN DATAS.

A judicial sale of a lease imposes upon the purchaser the obligation of paying the price to the vendor; and that of paying the rent, accruing after the sale, to the lessor, according to the terms of the lease; and this whether it is so announced in the advertisement or not.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. R. & H. Marr* for plaintiff. *E. Filleul* for defendant and appellant.

HOWELL, J. Plaintiff, as syndic, claims from defendant the rent due under the stipulations of a lease, the unexpired term of which was purchased by the latter, at the sale of the insolvent's effects. The defence is that the price paid was for the occupancy of the premises during the term of the lease yet to run, and not as a provision for the lease. This defence is inconsistent with the doctrine maintained in the cases of *Barrels et al. v. Their Creditors*, 11 A. 432, and *D'Aquin et al. v. Armant*, 14 A. 217; in which it was held that the "bid for the lease, in such a case, is a premium which the bidder is willing to give for the transfer of the lease to himself, with all the obligations, as well as all the rights thereto attached, from the moment of the adjudication;" and this, whether it be so announced in the advertisement or not. *It is the legal effect of the adjudication.*

It is not contended that defendant's liability to the syndic, who has paid the rent out of the funds of the insolvent estate, is different from that to the lessor.

Judgment is affirmed, with costs.

SUCCESSION OF BERNARD CHAPPEL : IDA HANNAH, f. w. c., v. H. B. EGGLESTON.

The slave who has acquired the right of being free at a future time, is, from that time, capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. N. Soulé* for plaintiff and appellant. *A. Grima*, curator *ad hoc*, for minor. *E. Bermudez*, for defendant.

LABAUVE, J. The deceased Bernard Chappel made his will by public act, on the 1st January 1853, by which he emancipated the said Ida Han-

nah and Clementine her daughter (both being at the time his slaves), and appointed them his heirs and universal legatees. The said testator having departed this life, his will was duly probated on the 23d January, 1854. It is admitted that Ida Hannah was duly and fully emancipated by the said Bernard Chappel before his death, but Clementine remained a *statu liber* under the will.

On the 11th December, 1861, the plaintiff, Ida Hannah, filed her petition, stating that the testator had appointed her and her said daughter his sole heirs and universal legatees; that the testamentary dispositions concerning said Clementine (a minor and a slave) falls, she, the said Clementine, being incapable of receiving it, the actual laws of the State of Louisiana prohibiting the emancipation of slaves. The said Clementine being a minor, without tutor, the court appointed Alfred Grima as her curator *ad hoc*, to defend this suit.

The said curator appeared and, in substance, denied plaintiff's right to the whole estate, and prayed that plaintiff's demand be rejected. He further prayed that the said Clementine be recognized as universal legatee with her said mother, of the said estate, and that the said Ida Hannah, her mother, be put in possession of defendant's share, in her capacity of natural tutrix, etc.

On the 14th February, 1860, the court below gave a judgment of non-suit against said plaintiff, and she appealed.

At the time of the making and probating of the will the said Clementine could have been absolutely emancipated under certain conditions; but there can be no doubt that she became a *statu liber* under the will, and entitled to receive donations. C. C. Arts. 193, 1462.

In the actual state of things, the said Clementine has been put in the full enjoyment of absolute freedom as a free person of color.

It is therefore adjudged and decreed that the judgment of the lower court be reversed, and that plaintiff's demand be dismissed. It is further decreed that the said Clementine be recognized as universal legatee with her said mother, each for one undivided half of the estate of said Bernard Chappel, and that the said plaintiff and appellant pay costs in both courts.

CITY OF JEFFERSON v. JOSEPH KAISER, et al.

Where the defendant is cited personally, and as president of a company, and answers for himself alone, there is no issue joined, and the case will be remanded.

APPEAL from the District Court of the Parish of Jefferson, *Cazabal, J. George S. Lacey and B. L. Lynch* for plaintiffs. *Roselius & Philips* for defendants and appellants.

LABAUVE, J. The mayor, aldermen and inhabitants of the city of Jefferson, after having alleged the facts and grounds in support of their demand, pray, in substance, that a writ of injunction may issue; that said Joseph Kaiser and the City Railroad Company may be enjoined and restrained from placing their cars on or running the same over the railroad track on Magazine street, in the city of Jefferson, between Toledano and Joseph streets; that the said Kaiser and the Jefferson City Railroad Company aforesaid may be cited to appear and answer this petition; that, upon trial, judgment may be rendered perpetuating the injunction, etc.

The record shows that a citation issued, addressed as follows:

"Mr. Joseph Kaiser, of the city of New Orleans, and Joseph Kaiser, president of the Jefferson City Railroad Company."

We find that Joseph Kaiser appeared and filed an answer for himself alone, not pretending to be or act as agent of the said Jefferson City Railroad Company. We have in vain looked in the voluminous record for an issue joined between the plaintiff and the said company, either by an answer or by a judgment by default.

The judgment appealed from must be reversed and the case sent back.

It is therefore adjudged and decreed, that the judgment of the District court be annulled and set aside, and that the case be remanded to be proceeded in according to law, the plaintiff and appellee to pay the costs of appeal.

CLARK, BROS. & Co. v. POWELL & Co.

Garnishees being stakeholders are liable only for the sum which they owe the defendants, and should not be made to pay interest until they are in default, as the garnishment process prohibits them from paying until ordered by the court. They are required to pay the attaching creditors only such sum as they may owe the defendants on a full and final settlement of their accounts.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
J. A. Rozier and Durant & Hornor for plaintiffs. *W. H. Hunt et al.*
 for defendants. *Bonford, Singleton & Clack, C. Roselius and Gaither &*
McPheeters for intervenors and appellants.

HOWELL, J. This is another of the series of attachment suits against those defendants which were consolidated and tried together in the court below and brought up in one transcript, two of which are just decided.

Plaintiffs obtained judgment against the defendants and the garnishees, James Connolly & Co., for the sum of \$712 33, with interest and costs, said sum being the balance declared to be due defendants by the garnishees, from which judgment the latter appealed and the plaintiffs have joined in the appeal, asking judgment for the whole amount of their claim, \$3,300. The defendants are made parties to the appeal. The garnishees being stakeholders are liable only for the sum which they owe the defendants and should not be made to pay interest until they are in default, as the garnishment process prohibited them from paying until ordered by the court.

By the change made in the sum awarded to Osborne & Tolle by the decision first rendered, the balance in the hands of the garnishees is increased to \$858 68, to which plaintiffs in this suit are entitled, as second attaching creditors.

We do not understand the necessity of rendering judgment in favor of the garnishees against the defendants for the amount which their account current shows to be in their favor, when it also shows a larger sum due the defendants. As garnishees, they are required to pay the attaching creditors only such sum as they may owe the defendants on a full and final settlement of their accounts, which, in this case, is the said sum of \$858 68.

The judgment must be amended so as to give plaintiffs the said amount in the hands of the garnishees.

It is therefore ordered that the judgment of the District court be amended, and that plaintiffs recover of defendants, *in solido*, the sum of \$3,300, with legal interest from judicial demand, and costs of the lower court, and with privilege on the property attached. It is further ordered that the demand of intervenors be dismissed, with costs, and that plaintiffs recover of Jas. Connolly & Co., garnishees, *in solido*, the sum of \$858 68 (being the balance in their hands due defendants), with legal interest from the maturity of this judgment; and that said Connolly & Co., appellants, pay costs of appeal.

JOHN KAISER v. THE CITY OF NEW ORLEANS.

The lessor has not the right to make any alteration in the thing let, during the continuance of the lease. In case of a breach of contract, by negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor.
The whole tendency of modern practice is to enlarge the admissibility of evidence, leaving the court to restrict its applicability.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
C. Roselius and W. H. Koontz for plaintiff. J. J. Michel for defendant and appellant.

ILSLEY, J. This action was brought in the Fifth District Court of New Orleans, to recover damages from the city for an alleged violation of a contract, entered into between the city and the plaintiff, by which the city transferred to him the right to collect the revenues of the city, accruing under its ordinance, from the meat market, situated in the Second District of the city, for one year, beginning on the 1st January and ending on the 31st December, 1859.

The city pleaded the general issue.

The obligations, rights and disabilities of the contracting parties are determined by Articles 2262, 2268 and 2670 of the Civil Code.

The plaintiff invokes the principle enunciated in Art. 2668, to this effect: *The lessor has no right to make any alteration in the thing, during the continuance of the lease*, whilst the defendant reposes on Arts. 2262 and 2670.

Upon the proper application of these articles to the facts involved in this case, depends the result at which we must arrive.

It is conceded by the defendant that changes and alterations in the construction of the stalls, tables, etc., were made by it, during the lease; but the city attempts to justify these changes, by referring to a state of things which had originally existed in the internal arrangement of the market. Its main defence is, that, when the plaintiff entered into the possession of the premises, the market was in a condition requiring various repairs; and it refers to its contract with Pelanne Brothers, who were charged with the execution of the work, to show that every care was taken by it to incommode the lessee as little as possible.

Assuming that all this is true, does it follow that the city has any legal right to make any alterations or changes in the thing leased?

Marcadé, commenting with that ability which distinguishes all his productions, solves this question. He says, commenting on Art. 1723 of the Napoleon Code, which corresponds with Art. 2668 of our Code:

“Le bailleur ne peut, à moins que le preneur n’y consente, apporter aucun changement pendant la durée du bail à la forme de la chose louée, et on ne pourrait plus sous le Code dire comme Pothier (No. 75) qu’il y aurait exception à ce principe, s’il s’agissait d’un changement peu considérable, très-intéressant pour le propriétaire et dont celui-ci offrirait d’indemniser le locataire. Le locataire peut toujours exiger que la chose soit maintenue dans l’état où il l’a louée; car il se peut que ce soit précisément à cause de cet état qu’il l’a louée.”

It would seem that this tribunal has seldom, if ever, had occasion to make application of Article 2668 of our Code; and, as a case very similar, in its features, to this one, has been adjudged by the Court of Cassation, involving the identical textual principle of law as it does, we adopt it, as conveying in clear terms, its applicability to the facts in that, and in the present case, presented. The case alluded to was submitted originally to the Cour Royal de Paris, by Laperrière C. Bertauld, and is thus reported in the Journal du Palais, 1844, vol. 1, p. 134:

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"En 1833, les sieurs Laperrière et Jarry devinrent locataires des vastes salles qui composent l'estaminet hollandais, au Palais Royal, à Paris, pour dix-sept ans, moyennant 9000 fr. par an.

En 1841, le sieur Bertauld, propriétaire de la maison, déclara aux sieurs Laperrière et Jarry, qu'il était dans la nécessité, pour le locataire d'une boutique au rez-de-chaussée, de donner à la cage de l'escalier la forme circulaire, au lieu de la forme carrée, et qu'il se croyait d'autant plus fondé à faire ce changement que dans le bail de 1831, les preneurs s'étaient obligés à supporter les réparations nécessaires."

Sieur Bertauld sustained his demand before the Cour Royale, but on appeal to the Court of Cassation the judgment was reversed, as appears by the final decree which is here copied *in extenso*.

"Considérant qu'aux termes des articles 1719 et 1723 C. Civ., le bailleur doit faire jouir paisiblement le preneur pendant la durée du bail, et qu'il ne peut changer la forme de la chose louée;

Considérant qu'il ne s'agit pas de réparations urgentes et nécessaires, à faire à l'immeuble loué à Lapellier, mais de travaux de constructions et de changements que le locataire n'est pas tenu de souffrir;

Considérant qu'il résulte du rapport d'expert dressé en vertu de l'ordonnance du référé, que les travaux projetés par Bertauld sont contraires aux droits des jouissances des locataires; que l'escalier dont il s'agit est une accessoire importante des lieux loués, surtout à raison de la profession exercée par Laperrière; que ces travaux qui auraient pour résultat de réduire de 75 centimètres la profondeur de l'escalier, seraient dans l'intérêt du propriétaire seul, et causeraient au locataire un préjudice considérable;

Que par conséquent c'est à tort que les premiers juges ont autorisé Bertauld à faire exécuter les travaux."

Another case, similar in its import, was finally decided in the same court in 1843. It was that of *Caisse d'Epargne de Paris v. C. Boudou Des restres*. See Journal du Palais for that year (1843), vol. 1, p. 343.

And in the Journal du Palais for 1856, vol. 2, p. 433, is reported another case, Lefebvre C. Gautherin, defining the meaning of the words "la forme de la chose" as not restricted to any change materially in the thing leased, "mais encore toutes modifications essentielles qui sans détruire la substance de la chose, en changent les conditions et la rendent impropre à l'usage auquel elle était destinée," wherein Gautherin, the lessee, recovered from his lessor heavy damages, for an unwarrantable interference by his lessor with his rights, and which damages were increased by the Court of Cassation, which held that "Considérant que les dommages intérêts alloués à Gautherin ne sont pas proportionnés au préjudice par lui éprouvé, et résultant soit des frais nécessités par son démé-

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nagement, soit de ceux auxquels a donné lieu l'appropriation d'un nouvel appartement, condamne Lefebvre ès nom à payer à Gauthérin la somme de 5,000 fr. en sus des 1,000 fr. à lui alloués par le jugement."

In Gauthérin's case, the change was not a material one, altering the substance of the thing, but imposing on him in violation of his contract and the law, neighboring tenants, whose occupation was incompatible with the peace and tranquility he sought in renting the premises from his lessor.

Some stress is laid upon the circumstance that, whilst the alterations and changes were being made by the city, there was no formal expostulation or remonstrance on the part of the plaintiff, and that the formal protest made by him was not until the 3d May, 1859, when the work was completed.

It is not urged, as an estoppel in bar, that the plaintiff made no formal opposition, but the fact is adverted to, we presume, as an excuse for the interference by the city with plaintiff's rights as lessee.

A case, bearing on the same subject, *Delahante C. de Tilière*, *Journal du Palais*, 1858, p. 36, is in point. It was therein held that "Le silence gardé par le locataire quand usant ou abusant de son droit de propriété, le bailleur a apporté des changements à la chose louée, emporte de sa part renonciation tacite au droit qui lui appartient d'exiger le maintien de cette chose dans son état primitif. Son droit se réduit alors à réclamer la résiliation de son bail ou des dommages intérêts." And this last is the remedy to which the plaintiffs have lawfully resorted.

In *Arrowsmith v. Gordon et al.*, 3 An. 105; *Porter v. Barrow*, *Ib.* 140; *Ryder v. Thayer*, *Ib.* 150; and *Gobet v. Municipality No. 1 and City of New Orleans*, 11 An. 300, the mode of assessing damages in cases like this is determined. In *Ryder v. Thayer*, Judge Eustis, the organ of the court, held: In case of a breach of contract by negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor. Beyond this, says the court, juries have no more right to exact a larger sum than they have to increase the amount due on a promissory note.

The plaintiff finds no difficulty in arriving at a definite result in this case, and concludes that the loss sustained by him exceeds considerably the amount claimed by him, *i. e.* twelve thousand dollars.

The defendant, on his part, contends that there is no sufficient and proper evidence before the court, to show that the revenues of the market were actually diminished after the making of the repairs in question; and the task devolves on this court to determine the nature and the extent of the defendant's liability, if any exists.

We have bestowed considerable care in the examination of the testimony, oral and documentary, adduced on the trial of this cause, and we are impressed with the idea that there was no necessity whatever to interfere with the arrangement of the stalls, which had always been kept in repair by, and adapted to the convenience and needful requirements of, the butchers who occupied them. This is well established by *Wagner*, *Fulton*, *Altmeyer*, *Wilson*, *Lord*, *Senatt*, *Barras* and *Culisto*, although the testimony of *Pilié* is at variance with it.

Some of these witnesses (and many others would testify to the same fact) paid the plaintiff one-half (or more) less than they had previously paid him; and one witness, *Lord*, says that he considers the difference of value of a stall, *before* and *after* the work, one-half. The average loss on each of the 204 stalls we compute to be forty cents per day; which, for sixty days, whilst the work was in progress, would amount to two hundred and four dollars, and, in the aggregate, to four thousand eight hundred and ninety-six dollars. After that period, it would not, we think, be reasonable nor equitable to compel the city to pay anything, as it was in the power of the occupants of the stalls to enlarge them, as they did afterwards, without opposition.

We find in the record a bill of exceptions, taken by the defendant, to the receiving as a witness for the plaintiff of one *Wagner*, to prove that he had sold meat outside of the market, whereby plaintiff had lost his dues or fees.

When defendant objected, on the ground of irrelevancy, because such an act was a violation of the city ordinances, for which a fine is imposed, and because the damage thereby was caused by the witness, and not by the defendant. The evidence was admissible, if the witness did not refuse to answer the question (see 9 La. 356); and it was immaterial to the defendant if he could not be answerable for the act of the witness. It was held, in *Lockhart v. Harrall*, 6 A. 538, that the whole tendency of modern practice is to enlarge the admissibility of evidence, leaving the court to restrict its applicability.

This court can only view the city as any other ordinary contracting party, and whilst due care will be taken to maintain its rights and prerogatives, so long as they are kept within legal bounds, it will not tolerate a disregard of the legal rights of others, who have paid for those rights a full equivalent.

It is therefore ordered, adjudged and decreed, that the judgment of the court below be annulled, avoided and reversed, and proceeding to give such judgment as should have been rendered by the said court, it is ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the plaintiff, John Kaiser, and against the defendant, the city of New Orleans, for the sum of four thousand eight hundred and ninety-six dollars, with legal interest from judicial demand; the costs of the court below to be paid by the appellant, and those of this court to be paid by the appellee.

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RICHARD BARRETT v. D. DONOVAN, et al.

If the appellee demand the reversal of any part of the judgment; or damages against the appellant, he must file his answer at least three days before that fixed for the argument, otherwise it shall not be received.

APPEAL from the Sixth District Court of New Orleans, *Howell, J.*
P. H. O'Neal for plaintiff. *T. S. McCay* for defendant and appellant.

LABAUE, J. This suit is brought against Donovan as drawer, and P. Halpin as endorser of a note, dated 6th February, 1861, payable 1st May, 1861, for \$450 with eight per cent. interest from maturity. A judgment by default was rendered, and made final below, against the defendants *in solido*, and they both appealed.

The death of the plaintiff having been suggested, on motion, it was ordered before this court that Patrick Irwin and Alexander Dapremont, testamentary executors of the late Richard Barrett, be made parties; they have appeared by counsel and prayed for the confirmation of the judgment, with ten per cent. damages. This case was called up the 22d, and fixed for argument for the 29th May, 1865. The plaintiffs and appellees filed their answer, praying for damages, on the 27th May, 1865. It was too late. C. P. Art. 890; 14 La. 288, 391.

The defendants and appellants have made no appearance in this court. The case was fixed for argument and submitted by the appellees, and it becomes the duties of this court to examine the record and render judgment for one of the parties, as the nature of the proofs and the justice of the case require. C. P. Art. 892.

After a careful examination of the record, we have been unable to find any notice of protest for the non-payment of the note sued upon and served upon the endorser, as prescribed by law. The judgment against P. Halpin is erroneous, and must be in his favor.

It is therefore adjudged and decreed, that the judgment, as regards the said P. Halpin, be reversed and rendered in his favor and against plaintiff, as in case of non-suit, and that it be affirmed as to the said D. Donovan; the appellees to pay one-half of the cost of appeal, and the said D. Donovan, appellant, the other half.

HOWELL, J., recused.

CITY OF NEW ORLEANS, for use of NICHOLSON & Co., v. LOUIS L.
FERRIERE, et als.

The city's acceptance of the work, for which it was authorized to contract, is *prima facie* evidence of its completion and mode of execution against the front proprietor, who becomes thereby bound. In contracts to be performed at a future period, the obligation which grows out of the contract arises at the very moment of making it, but the right of action growing out of it arises only when the stipulated term has arrived.

Execution of a judgment against a warrantor will be suspended until the warrantee shall have paid the amount thereof to the plaintiff.

A PPEAL from the Fifth District Court of New Orleans, *Eggleston, J.*
George S. Lacey and G. P. McPheeters for plaintiff. *Michel & Koontz*
for defendants and appellants.

LSLEY, J. The plaintiffs claim from the defendants, in the Fifth District Court of New Orleans, eleven hundred and eighty-two dollars and fifty-six cents, with interest, being the amount of a bill for paving done by Nicholson & Co., under a contract with the said city.

Gernon and Westmore, two of the defendants, and the vendees of L. L. Ferrière, pleaded the general issue, and by supplemental answer called in warranty, *Louis L. Ferrière, their co-defendant*, in this suit.

Ferrière excepted to the plaintiffs' petition, because it does not state any ownership to be in him of any definite piece of property, at the time the bill sued on was due; and, this exception being overruled, he filed his answer, pleaded the general issue, and denied specially that he was the owner of the property in front of which the pavement was made, and also denied that the forms and requirements of law had been complied with to order and execute the contract of sale by the city authorities, and that he is not bound thereby.

There was judgment in the lower court against the present owners of the property, Gernon & Westmore, for the whole amount claimed, with legal interest, and judgment in their favor over against their vendor and warrantor, L. L. Ferrière, for the sum of nine hundred and forty-four dollars and sixteen cents, with interest from 8th March, 1860.

Ferrière only has appealed to this court from the judgment rendered against him.

At the time of the transfer of the property, in front of which the paving was done, a large portion of the work was completed; and the question here presented is, who is bound to pay that portion—L. L. Ferrière, the vendor, or Gernon & Westmore, his vendees?

The exception to the petition filed by Ferrière is properly overruled; and, in the absence of fraud, which is not alledged, the city's acceptance of the work, for which it was authorized to contract, is *prima facie* evidence of its completion and mode of execution against the front proprietor, who becomes thereby bound. *Municipality No. 2 v. Guillotte*, 14 An. 297.

It was incumbent on Ferrière, in the language of Domat Book 1, title 2, sections 2, 3, to put a stop to the pretensions of every one that claims either a right of property in the thing sold, or any other right which

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FERRIERE. has bought. "For it is," he says, "the right to possess and enjoy, that he has bought." And this suggests the question whether, at the time of the sale from Ferrière to Gernon & Westmore, the property was legally affected with or subject thereafter to be affected with any privilege for paving in front of it, which was then in progress of execution; if so, the duty devolved on Ferrière to protect his vendees against the claim of the city, at least for that portion of the work which had been actually performed whilst he was the owner of it.

The work was not fully completed, and the account therefor was not definitely stated and recorded until a few days after Gernon & Westmore acquired the property, but we think the registry so legally made bound the property, in whose hands soever it may have been.

Of the whole amount due to the city, upwards of four-fifths of it was due and owing personally by Ferrière as owner of the property.

The work inured to his benefit. *Cujus commodum ejus debet esse incommodum.*

No action, it is true, then, lay against Ferrière for the recovery of the value of the work then partially executed; but he was, not the less for that, personally bound for it, as owner, with a lien against the property whenever the registry of the account for the whole work could be duly made. See 119 section of Art. 20, March, 1856, page 164. The obligation existed; the remedy only remained in abeyance. Art. 14 C. P. Duranton, Cours de Droit Français, Vente, § 258, says: "Mais quoique le droit du tiers qui a amené l'éviction ne fût point encore complet ou parfait au moment de la vente, la garantie n'en a pas moins lieu de droit s'il y a eu éviction; il suffit que le principe, ou la cause première de ce droit, existait lors de la vente."

"Il suffit que le droit fût antérieur à la vente dans son principe, ou sa cause."

On every principal of law and equity, Ferrière is as responsible for this prior debt of his, for which the property became affected, as he would have been for any other unsatisfied liability incurred by him for and operating a charge against the property. Of this opinion was the court *a quo*, which gave judgment against Ferrière and in favor of Gernon & Westmore, for so much of the claim of the city which it condemned them to pay, as was due by their vendor and warrantor, Ferrière.

This judgment must be affirmed, modified, however, in one respect, to suspend execution against Ferrière until so much of the judgment against Gernon & Westmore, as he is bound for, is paid by them. See *Melancon's Heirs v. Duhanet et als*, 7 La. 290; *Fletcher's Heirs v. Cavalier et al*, 10 La. 120.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be so amended that no execution shall issue against Ferrière therein, until Gernon & Westmore exhibit in the Fifth District Court of New Orleans satisfaction of so much of the judgment against them as is due by Ferrière; and that, so amended, the judgment of the lower court be affirmed, the costs of appeal to be paid by the appellant.

CITY OF NEW ORLEANS, for use of NICHOLSON & Co., v. PATRICK HALPIN.

In the absence of proof to the contrary it will be presumed that the city authorities have complied with all the formalities of the law in making a contract; *omnia presumuntur solemniter esse acta*.

In the absence of proof of fraud, the acceptance by the corporation of work which it was authorized to contract for is *prima facie* against the defendant, so far as it relates to its completion and the manner in which it was done.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
G. P. McPheeters for plaintiff. *F. Haynes* for defendant and appellant. *P. C. Cuvellier* and *F. Fuselier* for warrantor.

HOWELL, J. The defendant has appealed from a judgment condemning him to pay the cost of paving the street in front of his property.

The answer, besides the general issue, denies that the paving is made in conformity with the adjudication and ordinance, and denies the constitutionality of the law and the proceedings under it, by which defendant is made liable for the work.

On motion for a new trial it is urged:

1. That the law under which the paving has been done is unconstitutional.

2. That there was no evidence offered by plaintiff that all proceedings under the act had been complied with.

The first point we do not consider an open question, the constitutionality of this legislation having been long recognized in our jurisprudence. See 10 An. 59, and authorities there cited,

The second point might present some difficulty under the full and specific allegations of the petition and the general denial, had not the answer virtually admitted the passage of the ordinance and the adjudication to plaintiff and joined issue specially on the allegations as to the manner in which the work is done and the constitutionality of the laws and ordinances, while it is silent as to the observance of these formalities. It has been held that, in the absence of proof to the contrary, it will be presumed that the city authorities have complied with the law in this respect. 15 A. 376.

Everything up to signing the contract has to be done by or under the direction of public officers, in whose favor such presumption exists; and, as the law requires a public officer to accept the work, and certify to its being rightly done, it is considered that, in the absence of proof of fraud, the acceptance by such officer of the work, which the city is authorized to contract for, is *prima facie* evidence as to its completion and the manner in which it is done. 14 A. 297.

In this case, the contract and specifications, the certificate of the city surveyor and his testimony are in evidence, and until some rebutting proof is adduced, the defendant must, under the pleadings and the foregoing principles, be bound.

This is not a case in which damages should be allowed for a frivolous appeal.

Judgment affirmed, with costs.

THE STATE, on relation of the CRESCENT CITY BANK. v. THE JUDGE OF THE
THIRD DISTRICT COURT OF NEW ORLEANS, praying for a Mandamus.

Where the appeal is taken within the usual delay, and security offered, a mandate will issue compelling the judge *a quo* to send up the appeal, if the case is not within the exceptions mentioned in Article 580 of the Code of Practice.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J.*
Whitaker, Fellows & Mills and Miles Taylor for relator.

HOWELL, J. This an application for a writ of *mandamus* directed to the Judge of the Third District Court of New Orleans, ordering him to grant the relator a *suspensive* appeal from a judgment rendered by him in the case of *B. W. Huntington v. The Crescent City Bank*, No 19,766 on the docket of said court.

The *right of appeal* from said judgment is admitted, and the only question is, whether or not it shall be *suspensive*.

Article 575 C. P. provides, that if the appeal be taken within a fixed delay, and a legal and sufficient bond be given, it shall stay execution and all further proceedings, until a definitive judgment be rendered on appeal.

* This is the general rule, to which exceptions exist only as established by law.

In this case the application was made within the legal delay, and the required bond and security offered, and it is not shown that the law has deprived the relator of a *suspensive* appeal. The case is not within the exceptions mentioned in Art. 580 C. P.

The answer of the District judge being insufficient (C. P. 843), it is ordered, adjudged and decreed, that a peremptory *mandamus* issue herein in the name of the State of Louisiana, directed to the Hon. E. T. Fellowes, Judge of the Third District Court of New Orleans, ordering him to grant to the relator a *suspensive* appeal from the judgment rendered on 27th May, 1865, in the case of *B. W. Huntington v. The Crescent City Bank*, No. 19,766 on the docket of his said court,

T. W. WRIGHT & Co. v. JAMES S. BRANDER, SR., et al.

An appellant may be relieved when he has been prevented by circumstances beyond his control from obtaining and filing the transcript of appeal, although the clerk's certificate has been delivered to the appellee.

The absence of counsel furnishes no cause for excuse for not complying with the forms of the law.

A PPEAL from the Fourth District Court of New Orleans, *Théard, J.*
Miles Taylor for plaintiffs and appellants.

LSLEY, J. The plaintiffs in this suit took a rule in this court on the defendants, to show cause why they should not bring up hereto, from the Fourth District court of New Orleans, the transcript of appeal in the suit therein pending, and have the said transcript filed in the said appellate court, to be proceeded in due course of law.

The grounds upon which the motion rested, briefly stated, are the following, duly sworn to :

1. That a suspensive appeal was granted them in said suit, returnable to this court on the fourth Monday of June, 1864, and that bond, with sufficient legal security, was duly filed in said District court.

2. That, on the 19th May, 1864, James L. Brander, senior, took a rule in said District court on the appellants, to show cause why the said appeal should not be set aside ; which rule was, although twice set for trial, never disposed of.

3. That no transcript of appeal was ever made out by the clerk of the said District court.

4. That this court was duly organized, for the transaction of business, about the 3d April, 1865.

5. That there was no judge for, nor was any business transacted in, said District court during the intermediate time, when the appeal was granted and the Supreme Court was organized.

6. That R. King Cutler, Esq., the counsel of plaintiffs (their only counsel in said case), left the State on 26th November, 1864, on public business, and did not return to it until 6th May, 1865.

7. That, on 29th April, 1865, James S. Brander, Sr., obtained from the clerk of this court a certificate that no transcript of appeal had been filed in said case, and filed the same in the Fourth District Court, on the 29th April, 1865, and thereupon issued execution thereon, as if no appeal had been taken therein.

8. That T. W. Wright & Co. had no knowledge or information that the said transcript of appeal had not been filed in this court, until the sheriff, by virtue of the execution issued on said judgment, on the return into the District court of the non-filing of the transcript within the legal delay.

9. That they did not intend to abandon, but to prosecute said appeal in this court, and that they have, as they believe, done everything required of them for the attainment of that object.

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v.
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To this rule James S. Brander, Sr., answered, denying the plaintiffs' right to an appeal in the above suit.

He avers that more than three judicial days had elapsed since the return day of the appeal to this court, before the certificate of the court was obtained and filed in the lower court, and the *ft. fa.* issued thereon.

He further says, that the motion taken by him in the District court, to dismiss the plaintiffs' appeal, was indefinitely postponed, and, consequently, waived by the mover thereof; that, if the appeal was not brought up, or transcript made out, it was owing to the fault, neglect and omission of the plaintiffs, and that they cannot avail themselves of their own wrong; that J. W. Thomas, Esq., was one of their counsel, residing in New Orleans, and the absence of the other counsel last winter did not excuse their neglect. He denied all the other allegations in the rule, and prayed that it be rejected at their costs.

The rule which Brander had taken in the District court to dismiss the appeal was waived, as it was not tried before the return day of appeal. It was held, in *Kirkland v. His Creditors*, 8 N. S. 597; *McDowell v. Read*, 5 A. 42, and *French and Stark, Receiver, v. Charles Harrod*, 9 A. 21, that an appellant may be relieved where he has been prevented by circumstances beyond his control from obtaining and filing the transcript of appeal, although the clerk's certificate had been delivered to the appellee.

The appellants have not shown satisfactorily that they were prevented by circumstances beyond their control from procuring and filing in this court their transcript of appeal, within the delay prescribed by law; at all events, from moving within three judicial days after the extended return day for all appeals, for an extension of time to bring up their appeal.

The appellants reside in New Orleans, where it is a matter of notoriety this court has been in session since the 3d of April last.

As suitors, prosecuting an appeal in this court, the appellants are certainly presumed to have known that this court was organized and had commenced its sessions; but they contend that their sole counsel, to whom they had entrusted this case, was absent from New Orleans, in Congress, attending to his duties as Senator from this State. They must have known this, as it was a fact generally known to the community. They had ample time to procure other counsel; or they might themselves have done what was necessary to save their appeal, which required no professional skill.

The absence of their counsel furnishes no cause for excuse.

He was not, as is historically known, admitted to a seat in the United States Senate; and, in any event, the regular session of that body was terminated on the 3d March, giving the counsel ample time to resume his professional practice here.

But this is immaterial to the present enquiry, as we are satisfied that the appellants have not used the means they had to bring up their appeal, and have not shown ordinary diligence.

It is therefore ordered, adjudged and decreed, that the rule taken by the appellants be dismissed, at the costs of the appellants.

THE STATE on the relation of JAINE REMENDO, v. THE JUDGE OF SECOND
DISTRICT COURT OF NEW ORLEANS, praying for a Mandamus.

No testament can have effect unless it has been presented to the judge of the Parish in which he died, if he died within the State; therefore, an executor in possession of a will has the right to have a nuncupative will registered and executed, although the estate had been fully administered and the property delivered into the possession of the legal heir. It is not necessary that he should, nor can he, resort to a direct action of nullity, until the testament is ordered to be executed.

A PPEAL from the Second District Court of New Orleans, *Thomas, J.*
George L. Bright for relator.

HYMAN, C. J. The relator asks the court to grant a *mandamus* on the Judge of the Second District Court of New Orleans, requiring him to order the execution and registry of the nuncupative testament by public act of Pedro Remendo, deceased, and to deliver letters testamentary to him, as prayed for in his petition to the judge.

Respondent, in answer, alleges, that the estate of the deceased had been fully administered, and that the property of the succession had been delivered by a judgment of the court into the possession of the legal heir, and that the only remedy of the relator would be a direct action to annul said judgment.

What is required of the judge is a mere preliminary proceeding, and not a judgment binding on those who are not parties thereto. 2 An. 726.

It appears, from the will, that relator is an instituted heir, and was appointed executor.

Until ordered to be executed, the will is without effect (C. C. 1637), and relator has no right of action in consequence of the will.

Thus, while the judge announces to relator that his only right is a direct action of nullity, he prevents him from pursuing this right, under the rule, by refusing to order the same to be executed, and thus relator is left without remedy.

It is therefore ordered, that a peremptory *mandamus* issue in the name of the State of Louisiana, ordering said judge to comply with demand of relator.

THE COMMERCIAL BANK OF NEW ORLEANS v. THE CITY OF NEW ORLEANS.

Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning; and this rule is no less applicable to contracts than to laws. See Article 1943 C. C. A proposition should always be interpreted, *secundum subjectam materiam*.

When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both or by one, with the express or implied assent of the other, furnishes a rule for its interpretation. In a doubtful case the agreement is interpreted against him who has contracted the obligation.

The usage under a statute, if ambiguous, is its best interpreter. *Optima legum interpretis consuetudo*.

A charter granted in consideration of water supplied for public purposes will not be construed so as to apply to quasi-public purposes such as for the City Hall, etc. A "public" purpose is for the universal public, and not a portion of it.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
E. Rawle for plaintiff.—The act creating the corporation of the Commercial Bank of New Orleans was passed by the Legislature of Louisiana in the year 1833. Acts, p. 151.

It is stated in the preamble of the act that the chief object of the company is to be the conveying of water from the river into the city of New Orleans and its faubourgs, and into the houses of the inhabitants. The sections 4, 11 and 38 relate particularly to the conveying of water.

Section 38 contains the following enactment: "That the corporation of New Orleans shall be supplied by the said company, free of charge, with all the water necessary for the extinguishment of fires and any other public purposes: nor shall the city council be subjected to any charge for water furnished to supply the gutters of the said city and faubourgs; and that the company, as they progress in laying aqueducts, shall place, free of any charge whatever, two hydrants of a proper construction in front of each square, at a suitable distance from each other, from which a sufficient quantity of water may be conveniently drawn for extinguishing fires, for wetting, washing and watering the streets and gutters, and any other public purpose; that on the squares which do not front on the river, the hydrants shall be placed on opposite sides of the streets, at an equal distance from each other and the corners; that the said hydrants shall be of a proper size, and made so as, at all times, to furnish water for the fire engines and purposes herein mentioned, at all times, during the continuance of this charter, unless prevented by some unavoidable accident; and in case such shall occur, the repairs shall be made and the water again furnished at the expiration of the necessary delay; and the said company shall supply a sufficient quantity of clear, pure and wholesome water for the use of the inhabitants, within the limits aforesaid, at the elevation of fifteen feet when the same may be required; provided, however, that said hydrants shall be under the control of the Commercial Bank."

The attention of the court is first drawn for the correction of an error. It is said in the petition, that the city of New Orleans had not paid for the water furnished to certain establishments and places in the year 1853, and that a warrant,, issued for the purpose, had not been paid. This is

an error. At the trial, it was shown that the warrant had been paid. So much as relates to this part of the case is not to be considered. COMMERCIAL BANK
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At page 4, the petition continues: and it is further shown that the city of New Orleans is now indebted to the Commercial Bank of New Orleans for water furnished and supplied in the years 1854, 1855, 1856, 1857, 1858 and 1859, and an account is annexed to the petition, for each year, in detail. The whole cost during six years amounts to \$12,930.

The water was furnished and supplied to the public schools, to the offices of the city hall, to the offices of the recorders, to the houses of refuge, to the parish prison, to the corporation prison, to the watch-houses, to the workhouses and to the sugar platform.

Percy, witness, has been in the employ of the Commercial Bank since its organization; all the items in the account are correct; it is in the handwriting of witness, and was made out by him.

Witness states that from the first establishment of the water works, the accounts against the city of New Orleans, for all water supplied for the several items charged in the said accounts were regularly made out every year, presented and paid each year, without objection, until the year 1854, since which the city has refused to pay the accounts. Witness means to say that the account was made out and paid for all water supplied for any items such as charged in the account on file, but that there are some items in the account for which water was not taken in the first instance; refers particularly to the items for water on account of the public schools. There were no such schools till some years after the water works were established; thinks no water was ordered to be supplied to public schools until about 1844 or 1845; but as soon as water was taken for the schools, the charge for such water was made, and was paid, without objection, until 1854.

There was no house of refuge till the year 1851, or thereabout. But the items for the district courts, prisons and watchhouses were charged in the accounts from the beginning, and paid regularly each year until 1854.

The hydrants referred to in the section 38 of the charter were put up, as the charter requires, at the expense of the company, and have been since maintained free of charge, and all water required from these hydrants, for any and all public purposes whatsoever, has been supplied, free of charge, to the city.

The cost of maintaining those hydrants amounts to nearly \$6,000 a year. In witness' opinion, the quantity of water supplied to the city through these hydrants, if charged at the company's rates, would exceed, in witness' estimation, sixty thousand dollars per annum.

When water was ordered by the city to be supplied, in any other mode than by means of those hydrants, the cost of the pipes laid down for that purpose was paid by the city, and the water furnished in that way charged for and paid by the city, as already stated, till the year 1854, when the first objection on the part of the city was made.

The sugar platform was not supplied with water until 1858. The pipes were laid down at the request of the city, in 1858, and were paid for by the city.

The witness proceeds: The account for water supplied to the city in

COMMERCIAL BANK 1854, as the same is filed herein, has been regularly made out and charged
NEW ORLEANS. on the books of the company for each year, but has remained in suspense until this suit was instituted. The witness concludes his testimony by stating that all the water for the several items in account were furnished at the instance and request of the city.

Blair, witness, corroborates, so far as his knowledge extends, and says also, that all the accounts for the water supplied by the company are payable on the 1st of January of each and every year in advance.

February 6, 1860. The District court rendered judgment in favor of the Commercial Bank of New Orleans for \$12,930, and interest as stated.

October 9, 1860. The city of New Orleans appealed.

If it is supposed that the Commercial Bank is required to furnish the city corporation with water for every purpose for which the latter may ask to have it; or if, when furnished, the city need not pay for it, then there is a grave error and a wrong conclusion.

The chief object of the creation of the Commercial Bank, we are informed, was to convey water from the river into the city of New Orleans and its faubourgs and into the houses of the inhabitants, and that such object would greatly contribute to the security of said city from fire and to the health and convenience of the inhabitants. Thus we see that convenience, health and security were in view; the convenience and health of the inhabitants, and the security of the city from fire. To aid and effect this, and to furnish the means and facilities therefor, the company is required to furnish water for the extinguishment of fires, and for wetting and washing the gutters and streets, and for any other public purposes, and that there shall be no charge for such supply. In order to supply water for these purposes, the company place, at their own expense, hydrants or fire plugs in each square, from which may be drawn a sufficient quantity of water for the purposes which are mentioned.

After twenty years' compliance, the corporation of New Orleans now refuses to pay for the water supplied and furnished to the places and establishments which are stated in the petition and by the witnesses.

Is there any ground or reason for such refusal? First, it must be stated that in all that relates to conveying of water, the law creating the company has not been changed or amended.

We have seen in the section 38 the purposes for which water shall be supplied, free of charge. They are, extinguishment of fires, wetting the streets, washing the gutters, and other public purposes.

It is not apparent that there is any doubt or mystery in the language of the section. A short examination, however, and some remark must be presented to the court.

1. To know the meaning of each word used in the section might be sufficient in order to interpret the expressions. What is the meaning of the word public? In the dictionary of Richardson, it is said that "public" signifies "of, or pertaining or belonging to the people, the many, the multitude." In the Louisiana Code, we find: "Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all members of a nation." Art. 444. Things which are for the common use of a city or other places, as streets and public squares, are likewise public things." Art. 145. According to these de-

finitions, the intention of the legislature seems to be free from doubt of COMMERCIAL BANK question; and that the supply of water to the mayor's office and other NEW ORLEANS places mentioned in the petition is not for public purposes, and therefore the supply is not free of charge. The object and nature of the supply, the places to which it is furnished, and the manner in which it is used, exclude any other construction.

2. But apart from all criticism and verbal signification, we can find a suitable and appropriate construction in the act of incorporation, by analysis and by comparison. To this mode of construction we are directed by the Civil Code: "When the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous, phrases and sentences may be compared, in order to ascertain their true meaning. C. C. 16.

In order to apply this rule, we must first learn the nature or character of the supply of water for extinguishment of fires and wetting the streets. It may be safely asserted that these are public purposes. But if it be doubted, let the remaining part of the sentence be examined. We find there the words "other" and "other purposes." The word "other" is a correlative and specifying word, and its use proves the meaning of the previous part.

Thus it is shown, in two ways, that extinguishing fires and wetting the streets are public purposes. Now, it is only for public purposes that water shall be supplied free of charge, and without being paid for. Is the supply of water, as stated in the petition and by the witnesses, for a public purpose? Taking the meaning and intent from the reasoning and authorities referred to, we find that it is not. We find the sense of one clause by comparing it with others, whose meaning is obvious. E. C. L. R. 42, 14.

Thus the meaning of a word or a phrase may be ascertained frequently by looking at other words in the same law, and particularly in the same sentence. *Copulatio verborum iudiciali acceptationem, in eodem sensu.*

3. There is another provision, however, in the same section, 38, which serves to give aid in the interpretation and construction. It is said, "that the said hydrants shall be of a proper size, and made so as, at all times, to furnish water for the fire engines and purposes herein mentioned."

The purposes "herein mentioned" are those which are mentioned in section 38, and they are public purposes. For such it is plain that the water furnished shall be only that which is drawn from the street hydrants. For a public purpose, no other mode is intended, and the provision quoted is exclusive of any other. Referring again to the petition and evidence, we find that for none of the purposes mentioned, is the water taken from the street hydrants, nor is it applied to the extinguishment of fires or wetting the streets.

It is not required to extend the examination of the act of the legislature. To the foregoing may be added the understanding and acquiescence of twenty years' duration.

The District court decided correctly that none of the charges stated in the petition were for water supplied for any public purpose, and were not free of charge.

The Commercial Bank of New Orleans expends yearly about \$6,000 to

COMMERCIAL BANK maintain the street hydrants in good condition. The estimate of the value of the water furnished by means of the street hydrants exceeds sixty thousand dollars per annum, and for this nothing is paid by the corporation of the city or by the inhabitants.

Miles Taylor and Thos. H. Hewes for defendant and appellant.—This is a case in which the plaintiffs seek to set aside the plain provisions of a contract between themselves and the State of Louisiana, and which was introduced into the contract for the benefit of the people of the city of New Orleans, on the authority of an error fallen into on the part of the city officials, at different times, since the making of that contract. The temporary practice of the city in paying the charges made against it improperly, by the plaintiff, on which their right to recover in the present action is based, is not ancient enough to have the force of a custom; nor did it obtain at such times, or under such circumstances, as to give it any weight as affording any evidence of the construction placed upon it by the parties making the contract.

This will be at once apparent from two facts which are patent on the record: 1. The act of the legislature of the State, in which the contract is contained, was passed in 1833; and, 2. The city was not a party to the formation of the contract, and is only a beneficiary under it.

The question presented in the cause, then, is this: What is the extent of the obligation imposed on the plaintiffs by the act of 1833, in favor of the city of New Orleans?

We shall not make a written argument on this question; but now present to the court the following points, as those chiefly to be insisted on in the oral one to be made to the court.

1. It was the intention of the legislature to require a supply of all the water needed for any public purpose, within the limits of the city and its faubourgs, from the plaintiffs, free of charge.

2. Water required for any use which is to be paid for out of the money in the city treasury, is water supplied for a "public purpose," and, as such, it is to be supplied by the plaintiffs to the city, free of charge.

3. The provisions of the 38th section of the plaintiffs' charter, directing two hydrants, of a proper construction, to be placed by plaintiffs, "free of any charge whatever," in front of each square, were not intended to limit the supply of water for public to that to be furnished by those hydrants, but was only designed to limit the obligation of the plaintiffs in furnishing the fixtures requisite for distributing and carrying water to the points where it was to be made use of.

4. The provisions contained in the act No. 228 of the acts of 1852, approved March 17th, 1852, support the construction of the act of 1833, contended for by the appellant.

ILSLEY, J. This action was instituted by the plaintiff to recover from the defendant the aggregate sum of twelve thousand nine hundred and thirty dollars, for water furnished and supplied by the plaintiff to the public schools, to the offices of the city hall, to the offices of the recorders, to the houses of refuge, to the parish prison, to the corporation prison, to the watchhouses, to the workhouses and to the sugar platform, as the same is particularly set forth in the plaintiff's petition and in the detailed account annexed to it.

The plaintiff's demand is resisted by the city, which traverses it, by setting up the general issue. COMMERCIAL BANK
NEW ORLEANS.

The plaintiff had judgment for the whole amount in the court below, and from that judgment this appeal is taken.

The defence, on which the defendant relies to defeat the plaintiff's claim is, that, under the charter of the Commercial Bank, it was incumbent on it to supply all the water needed for any public purpose, within the limits of the city and its faubourgs, free of any charge; and, if this were really so, the plaintiff's claim should be rejected.

To determine whether this position is a tenable one, reference must be made principally to the thirty-eighth section of the act of incorporation, which, as the result of our present enquiry depends upon a correct solution of it, is herein transcribed, *in extenso*:

"Sec. 38. Be it further enacted, that the corporation of New Orleans shall be supplied by said company, free of charge, with all water necessary for the extinguishment of fires and other public purposes; nor shall the city council be subjected to any charge for water furnished to supply the gutters of the said city and faubourgs; and that the said company, in the progress of laying aqueducts, shall place, free of any charge whatever, two hydrants of a proper construction, in front of each square, at a suitable distance from each other, from which a sufficient quantity of water may conveniently be drawn, for extinguishing fires, for wetting, washing, watering the streets and gutters, and any other public purpose; that, on the squares which do not front on the river, the hydrants shall be placed on opposite sides of the streets, at equal distance from each other and the corners; that the said hydrants shall be of a proper size, and made so as at all times to furnish water for the fire engines and purposes herein mentioned, at all times during the continuance of the charter, unless prevented by some unavoidable accident, and in case such shall occur, the repairs shall be made and the water again furnished at the expiration of the necessary delay; and the said company shall supply a sufficient quantity of clear, pure and wholesome water, for the use of the inhabitants within the limits aforesaid, at the elevation of fifteen feet, when the same may be required: provided, however, that the said hydrants shall be under the control of the Commercial Bank."

In connection with section thirty-eight, it will be useful to refer to a portion of section eleven of the same act, which provides for the expeditious progress of the water works: "so that the city of New Orleans and the faubourgs thereof, may be furnished with water in the streets; and such inhabitants may procure it by means of conduits or pipes, within their houses and lots, at a price to be regulated by the company." Had the purposes for which water was to be furnished to the city, free of charge, been fully specified in section thirty-eight, or elsewhere in the act, no question could possibly have arisen as to the purposes intended; but the use of the words "other public purposes," as the complement to the specified purposes, in one instance, and the words "any other public purpose," in the second instance, is what gives rise to this controversy and necessitates a judicial interpretation of the section referred to, in order to determine whether the charges set out in the bill of particulars are exigible or not.

CONFUCIAL BANK The contract contained in the plaintiff's charter was one between them
NEW ORLEANS. and the State, and the connection between the city and the water works company has existed from the outset, and is of the most intimate character, if the city was not actually a party to it. The city furnished two out of the five commissioners. It was authorized to subscribe, and did subscribe for five thousand shares of the capital stock of the company, not subject to reduction. It might annually appoint a committee, to have access to such of the books of said bank as relate to the water works, and to make such extracts from the same as it might deem necessary. The very object of the incorporation of the company was, as stated in the preamble of the charter, "to convey water from the river to the city and its faubourgs," to contribute, among other things, "to the security of the city from fire."

Reading sections 11 and 38 of the plaintiff's charter or contract, with the view of ascertaining the common intent of the parties, and, to this end, applying to it those rules of interpretation which the law furnishes to unravel doubtful or obscure clauses in statutes or contracts, we are not greatly embarrassed in putting, as we think, a correct construction on that section which requires the bank to supply water to the city of New Orleans, free of charge, for the *public* purposes therein prescribed.

The first rule for the interpretation of a law is found in Article 16 of the Civil Code :

"Where the words of a law are dubious, their meaning may be sought by examining the context, with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning;" and this rule is no less applicable to contracts than to laws. See Article 1443 C. C.

These rules are merely the enunciation of the one founded in common sense, that a proposition should always be interpreted *secundum subjectam materiam*.

The words, "and other public purposes," first used in the section 38, are intended as the complement to the only prescribed purpose, so far mentioned : the furnishing of water necessary for the extinguishment of fires, free of charge; and the words, "for any other public purpose," subsequently found in the same section, are also used as the complement not only to the first prescribed purpose, the extinguishment of fires, which is again mentioned in the same connection, but to other prescribed public purposes, for "wetting," "washing" and watering the streets and gutters; and the words, "other public purposes," and "any other public purpose," are to be understood as being of a like character with the public purposes specially mentioned; and they are all, whether specially described or embraced in the more general or comprehensive term, to be subserved in the mode, and the only mode, prescribed in section 38.

The act of incorporation contemplated and provided but one place, and one mode, by which the city was to be furnished, without charge for the necessary supply of water for the public purposes mentioned, specially or generally. The place was "in the public streets," and the mode was through the company's hydrants placed therein, and controlled solely by them. That was one of the prescribed modes; the other mode was a lateral division of the water from the main pipes or aqueducts, through con-

necting pipes, into the yards and houses of inhabitants; but, that supply, COMMERCIAL BANK
NEW ORLEANS. by the last mode, at a certain elevation, to whomsoever and for whatever use it was furnished, was not intended to be a gratuitous supply, or one free of charge, but for a price to be fixed by the company.

The mode of supplying water, free of charge, for public purposes, is a key to the sense in which those words must be understood. It was the supply to be furnished *in the streets and through the hydrants*. This view of the obligation imposed on the bank to furnish water to the city, free of charge, for every public purpose, might supercede the necessity of enquiring into the verbal signification of the word "public," as used in section 38. Whatever was the character of the described *public* purposes, the use of the words *other* and any *other* public purpose, put all the public purposes, whether special or general, if not into the same class, upon an equal footing, so far as related to the mode of satisfying them.

Under the Roman law, things for public use were divided into two kinds *only*: 1. Those destined for the common use of mankind, and which every one might freely use, such as rivers, seas, the banks of rivers and the sea shore. These things were destined by nature for public use. 2. Those things which public policy deemed necessary and appropriate in spiritual or temporal affairs. In the last mentioned class were embraced the streets, highways, market places, the places where courts of justice were held, colleges, town-houses and other public places. Domat, book 1, tit. 8.

Art. 445 of our Code subdivides the last class into two kinds: 1. Common property, to the use of which all the inhabitants of a city, or other place, are entitled in common; such as the streets, the public walks and the quays; and, 2. Common property which, though it belongs to the corporation, is not for the common use of all the inhabitants of the place; but may be employed for their advantage by the administrators of its revenues.

The "public purposes" intended by the legislature in the act of incorporation are such as bear relation to the things properly classed as public things, and which are included in the first division of common things, in Art. 449, such as the streets, the public walks, etc.

It was not contemplated that such buildings or establishments as are included in the second division of common things, and which are not for the common use of *all* the inhabitants of the city, although employed for their advantage, such as the city hall, the court house, the public school, etc., should receive from the bank a supply of water free of charge.

The purposes specially mentioned in Art. 38 are strictly *public* purposes, connected with public things, in which all are interested, and which are for the common use of all; and "other public purposes" contemplated by the legislature were, it is safe to presume, of a like character.

If water was needed for any quasi-public purpose, to be furnished gratuitously, provision should have been made for it in the charter, which prescribes the obligations of the bank, and which no consideration of public convenience can render more onerous.

The act of the legislature, passed in 1852, at page 158, exempting the property held by the plaintiffs from any taxation by the city of New Or-

COMMERCIAL BANK LEANS, provided "that all charitable institutions in the said city be supplied with water free of charge," was simply a proposition to the plaintiffs to grant them this boon; provided they would supply, not all the public or quasi-public institutions in the city, which were then paying without objection, but only all charitable institutions (public and private) in the city. It throws no light on the contract or charter granted in 1833, even if the bank had accepted the proposal, unless the fact being manifest that all the public charitable institutions in the city had been furnished, up to the date of the act, with water, for a price paid by the city; that the exemption from such payment in future, for a valuable consideration, was virtually a recognition by the legislature that the construction which the parties had put upon the words, "other public purposes," was the correct one.

It is in proof that, up to the year 1854, more than twenty years after the date of the charter, the plaintiff and defendant have put upon the sections 38 and 11 the construction we now put upon it. Up to that time, the water rates were always paid for the purposes described in the petition; and this is a fit case to apply the rule of interpretation found in Arts. 1951 and 1957 of the Civil Code. See also 11 A. 113; 10 A. 601; 4 A. 441; 2 A. 475; 1 A. 230, 232.

It has been held by this court, that "the usage under a statute, if ambiguous, is its best interpretation." *Optima legum interpretis consuetudo.*

"The common interpretation of statutes which had existed for a length of time, will be considered, as it generally is, the correct interpretation." 1 Hen. Dig. 1861, 786-7.

In *Clay v. Bullard*, 9 Rob. 308, it was held that "contracts will be construed as the parties must be supposed to have understood them at the time of their execution.

It has been held that the intention of the parties must be sought in the whole language and the surrounding circumstances, to which the instrument itself points. *Peck v. Bemis*, 10 A. 160.

The argument of defendant's counsel, that water required for any use which is to be paid out of the money in the city treasury, is water supplied for a public purpose, and as such, it is to be supplied by the plaintiff, free of charge, is wholly untenable, unless the words used, "other public purpose" and "any other public purpose," are equivalent to and convertible terms with "any purpose whatever," which are no where to be found in the charter.

The judgment of the District court is according to law and the evidence, and must be sustained.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be affirmed, the costs of appeal to be paid by the appellant.

HOWELL, J., recused.

WIDOW VINCENT v. JOHN SCHWEITZER.

Where the suit was originally for more than three hundred dollars but a part was remitted so as to reduce it below that amount, this court cannot entertain jurisdiction. But where a reconventional demand is set up for an amount over three hundred dollars, the court will hear the defendant's appeal on that.

A PPEAL from the Second District Court of New Orleans, *Handlin, J.*
E. Filleul for plaintiff.

J. Magne for defendant.—1. The amount in dispute is tested by the sum claimed in the petition. *McKee v. Ellis*, 2 An. 163; *Succession of Stafford*, 12 Rob. 178; *Gerber v. Marsoni*, 3 Rob. 370.

2. The plaintiff cannot give jurisdiction by fictitious claims, even when embodied in his petition. *Dabbs v. Stevens*, 3 Rob. 143; *Red River R. R. Co. v. Williams*, 16 La. 183; *Orillon v. Slack*, 17 La. 103, 104; and she cannot consequently take off said jurisdiction by fictitious reductions.

3. The claim of plaintiff and the contingent counter-claim of defendant are an entirety by the nature of the case, and cannot be separated; cannot be investigated separately without doing a manifest injustice to the defendant. *City of New Orleans v. The Estate of Arthur McArthur*, 12 An. 47. Besides, these two claims may be considered as consolidated. *Marshall & James v. Fall & Co.* 9 An. 92. See the declaration of Mrs. Dumoulin, p. 12.

LSLEY, J. The demand of the plaintiff against the defendant was originally stated to be over three hundred dollars, but was afterwards admitted by the plaintiff, in the record, to be for a sum less than three hundred dollars. The amount in dispute is, consequently, too small to give this court jurisdiction of the present appeal, which is not, therefore, judicially before us. See State Constitution of 1864, tit. 5 Art. 70; Act of Leg. 1864, No. 11, p. 18.

There is, however, in the same record, a reconventional demand set up by *John Schweitzer v. Widow Vincent*, for the sum of four hundred and forty-five dollars, for rent. We can, therefore, entertain his appeal for that. See *Gove v. Kneatig*, 3 Rob. 387; *Hanna v. Bartlette*, 10 Rob. 438; *Esparte Goodwin*, 11 Rob. 12.

The case of *Marshall & James*, 9 An. 92, cited by plaintiff in reconvention, is not, we think, applicable to a case like this.

We have examined the demand of the plaintiff in reconvention and the evidence adduced on the trial of the case, and, we think, it fails to prove any indebtedness by the defendant for rent, for the period for which it is claimed. *Actori incumbit probatis*.

The plaintiff having failed to make out his case, the judgment of the lower court on the reconventional demand must be affirmed.

It is therefore ordered, adjudged and decreed, that the judgment of the court below on the reconventional demand be affirmed, the costs of appeal to be paid by the plaintiff in reconvention and appellant.

JOHN WILLIAMS v. WILLIAM HALSMITH.

The holder of a note for the payment of money, according to the act approved March 20th, 1856, can only recover eight per cent. interest, notwithstanding the rate of interest agreed upon may be beyond eight per cent.

A PPEAL from the Fifth District Court of New Orleans, *Ogden, J.*
B. Egan for plaintiff. *Culler & Thomas* for defendant and appellant.

HYMAN, C. J. Plaintiff sued defendant on a promissory note made by defendant on the 3d day of May, 1860, in the city of New Orleans, wherein he promised to pay, in the Citizens's Bank, to C. B. Logan & Co., or order, the sum of six hundred and fifty dollars, with ten per cent. interest from date.

Defendant, in answer, denied that plaintiff was owner of the note, and propounded to him interrogatories on facts and articles.

The answers of plaintiff to the interrogatories fully proved his ownership in the note.

Judgment was rendered in the lower court against defendant for the amount of the note, say \$650, with ten per cent. interest from its date.

Defendant appealed.

The judgment is erroneous in allowing this high rate of interest.

It is provided by an act entitled "an act relative to the rate of interest," approved March 20th, 1856, that the holder of a note for the payment of money can only recover eight per cent. interest, notwithstanding the rate of interest agreed upon may be beyond eight per cent.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be avoided and reversed; and it is further ordered, adjudged and decreed, that plaintiff have judgment and recover of defendant the sum of six hundred and fifty dollars, with eight per cent. per annum interest thereon from the 3d day of May, 1860, till paid, and the costs of suit, less the cost of appeal. The cost of appeal to be paid by plaintiff.

EDWARD CONERY v. JAMES O. NOYES.

Where there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action. So, where a defendant accepted and used a steamboat, without objection, he can still recover from the plaintiff damages in reconvention, on a contract unskillfully executed.

A PPEAL from the Sixth District Court of New Orleans, *Leaumont, J.*
Durant & Hornor for plaintiff.—The verdict of the jury in this case is equivalent in law to a verdict on the defendant's reconventional demand in favor of this plaintiff; that, in error, the judge of the lower court reserved the right of defendant to sue respondent in a new action; and though a fair trial has been had before the jury on this reconvention, and a virtual verdict thereon rendered, permission is given to renew the same litigation hereafter, contrary to well settled principles of law. *Interest rei publicae, ut sit finis litium.*

Wherefore, respondent prays that the judgment appealed from be amended, and final judgment rendered in his favor on the defendant's reconventional demand; that, in all other respects, the judgment be affirmed, with costs and general relief.

Atocha & Howe for defendant and appellant.—The judge, before whom the case was tried, erred in charging the jury that, "if the defendant accepted and used, without objection, the steamboat *Bella Donna* when she came from the hands of the plaintiff, he cannot recover, in reconvention, damages for failure of plaintiff to perform his duty in the premises."

In support of this doctrine, the judge cites the case of *Loreau v. De-clouet*, 3 La. p. 1, and *Dyer v. Seals*, 7 La. p. 134.

The illustration, in the opinion of the judge, drawn from the art of portrait painting, is not in point. The plaintiff did not make and deliver to us a steamboat; if he had, we might, after a fair trial and acceptance, have been bound to pay him its real value; but no such state of facts is in this case. The facts are, that the plaintiff, as lessor of his professional skill, undertook to superintend the construction of the defendant's steamboat, built upon the defendant's barge with the defendant's materials, and with labor paid by the defendant. The boat has always been the defendant's. The plaintiff has furnished to her nothing but his professional supervision, and this has proven to have been an injury. With what reason, then, can it be said that because the defendant has retained in his possession and use a boat which has always been his and always in his possession, he cannot maintain an action against the plaintiff for malpractice in his professional employment.

So with the case of an apparatus for a broken leg, instanced by the judge below. That is not in point. The real illustration is a broken leg itself. If a surgeon sets my broken leg, and sets it so unskillfully that it is unduly distorted, can he reply to my claim for damages (precisely similar to the claim in reconvention in the case at bar), "you cannot recover because you have accepted and used your leg since I had it under my charge?" We think not. But the doctrine of the judge below, if car-

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ried out fully, would require me to abstain from walking (or limping) until my suit should be decided. It is equivalent to saying to the defendant in this case: "You had no right to try or use your steamboat at all. You should have abandoned her and let her rot until your case could have been tried. The fact that you are in possession of your own boat precludes you from suing for damages to the boat."

The cases of *Loreau v. Declouet*, and *Dyer v. Seals*, then, merely establish this: that a plaintiff who has delivered incomplete work, which has been accepted, may recover its actual value, but they by no means decide that the defendant, in the same action, may not recover, in reconvention, damages against the same plaintiff. On the contrary, when construed with the case of *Overton v. Simon*, and the other cases cited under the first point of this argument, they clearly show the contrary. The spirit of these cases, as stated by Mr. Hennen with precision in his Digest, edition of 1861, p. 1025, No. 4, as follows:

"In commutative contracts, a partial performance authorizes a recovery to the amount to which the other party is benefited, after deducting the damages sustained by a failure to perform the other parts of the agreement." 3 L. 1, 4 L. 465, etc.

The jury neglected to make any finding upon the claim of the defendant. Whether this arose from the erroneous charge of the judge, or from ignorance on the part of the jury, is impossible to determine. But the fact remains that the claim of the defendant was pleaded, proven and submitted to the jury, and yet remains undecided by them. It should be sent back to a jury for decision. *Johnston v. Bagley*, 4 La. p. 334; *Welsh v. Barrow*, 9 R. p. 520.

The cases cited by the judge below, in opposition to this view, are not in point. The first, *Kelly v. Caldwell*, 4 La. p. 40, was a case where damages were claimed by plaintiff, an actor, for breach of contract, and the defendant reconvened and charged the breach to have been occasioned by the plaintiff. There was but one question, one breach of contract, in the case, and the court very justly decided that a verdict in favor of the latter was a verdict against the former.

But, in the case at bar, as in the case of *Overton v. Simon*, it is not impossible for both parties to recover, the plaintiff for his labor, and the defendant for his damages; and the rule, in *Johnston v. Bagley*, applies, namely: that the defendant cannot be put out of court with the pleasing assurance that he may bring a new suit, but that he is entitled to have a finding upon its pleadings and evidence.

The other cases cited by the judge below are equally inapplicable. *Erwin et al. v. Bissell et al.*, 17 La. p. 92, was an action to compel compensation of a judgment, and the question we are considering, coming up quite indirectly, was disposed of thus: "Admitting that it might have been assumed as error that the jury took no notice of the reconvention, yet no objection was made to the form of the verdict on the appeal, and in our opinion the judgment forms the authority of the thing adjudged."

The case of *Theriot v. Henderson*, 6 An. 222, is based by the court upon that of *Kelly v. Caldwell*, and should be limited to the state of facts reported in the latter.

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LABAUE, J. Petitioner alleges that the defendant employed him as his agent to superintend the building of the steamer *Bella Donna*, to purchase materials and supplies for the said boat; that no amount was specified as the value of services, which are well worth \$300 per month, commencing 1st December, 1863, to 21st March, 1864, making \$1,100, for which he prays judgment.

The defendant answered by a general denial, and that plaintiff, representing himself to be skillful in such matters, engaged himself to respondent to superintend certain repairs of the steamer *Bella Donna*, about November, 1863, and that, in violation of his agreement, the plaintiff conducted and superintended said repairs so unskillfully and extravagantly, that the said repairs cost upwards of \$40,000, instead of \$22,000, as he had promised, and that he has suffered damages to the amount of \$32,000, which he pleads in reconvention, and for which he prays judgment.

It was admitted on trial that plaintiff was employed by defendant, as set forth in plaintiff's petition, and that his services were worth the sum of \$300 per month, if he faithfully performed the duties of his profession and employment.

After the case had been tried, and was about being submitted to the jury, the defendant took a bill of exceptions to that portion of the charge of the court which states: "that, if the defendant accepted and used, without objection, the steamboat *Bella Donna*, when she came from the hands of the plaintiff, he cannot recover, in reconvention, damages for failure of plaintiff to perform his duty in the premises."

The jury found a verdict for plaintiff for \$1,100; and the court, after having overruled a motion for a new trial, gave judgment accordingly, and the defendant took this appeal.

We are of opinion that our learned brother below erred in his charge excepted to. If the plaintiff performed his contract unskillfully, and in such a manner as to cause damages to the defendant, it was an active violation of the contract; and the receiving and using of the steamboat by defendant cannot be considered as a discharge of plaintiff's liability and responsibility to the defendant. C. C. Art. 1926. *Lobdell v. Parker*, 3 L. 331. *Morton v. Pollard*, 9 L. 174. *Overton v. Simon*, 10 A. 685. *Miller v. Stewart*, 12 A. 170. *Nicholson v. Desobry*, 14 A. 81.

It is therefore ordered, adjudged and decreed, that the verdict of the jury be set aside, and that the judgment appealed from be annulled and avoided, and the case remanded, to be proceeded in according to law; the appellee to pay the costs of appeal.

CATHERINE A. M. PECQUET *v.* PECQUET'S EXECUTOR et al.

Actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge, if he fails to do it.

The right of either party to a bill of exceptions is reserved to the court, and the court is to pass upon the admissibility of the evidence.

The only mode pointed out by law to test, in this Court, the correctness of the opinions of inferior courts, is by bill of exceptions, and in no other form can it revise such opinions. It is only when the question decided is presented by the pleadings that a bill of exceptions may be dispensed with.

Contracts are governed by the law of the place where they are entered into. The forms, the effects, and the prescription of actions are governed by the law of the place where they are brought. C. P. 13. An exception to the general rule, that a foreign law must be proved in our courts, is made when that law was once the law of this State.

The laws of France must be proved; because, having been abrogated as the prevailing general law of the province many years prior to our acquisition of Louisiana, and never thereafter adopted as such, we do not possess judicially the means of knowing what French laws in particular were retained by Spain, and handed down to us.

If a donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects to be given, the donation, though not accepted in express terms, has full effect.

A *dilatory exception*, as for instance a premature suit, might have been successfully urged in *limine litis*, but cannot avail a party after a judgment by default.

An obligation *in solido* is not presumed; it must be expressly stipulated. This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law.

A person may, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.

All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage, or to belong to her at the time of the marriage, is paraphernal.

The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits, as above expressed.

Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not.

All persons have the capability to contract, except those whose incapacity is specially declared by law. These are persons of insane mind, slaves, those who are interdicted, minors, married women.

The incapacity of the wife is removed by the authorization of the husband, or in cases provided by law, by that of the judge.

The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessities for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them.

The unauthorized contracts made by married women, like the acts of minors, may be made valid, after the marriage is dissolved, either by express or implied assent.

Under the provisions of our law the contract of suretyship is of a mixed character.

The obligation of the surety is to pay the whole debt; but this solidarity is tempered by the right of division. The right, however, vests in *acculat*.

The surety has the right to demand the division, but until the right is exercised the obligation is solidary.

When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exist a community of gains. If there do not, each party enjoys as he chooses, that which comes to his hands; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.

The suretyship cannot exceed what may be due by the debtor, nor be contracted under more onerous conditions.

It may be contracted for a part of the debt only, or under more favorable conditions.

The suretyship which exceeds the debt, or which is contracted under more onerous conditions shall not be void, but shall be reduced to the conditions of the principal obligation.

A man may be surety without the order or even the knowledge of the person for whom he becomes surety.

Subrogation takes place of right for the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it.

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A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Durant & Hornor for plaintiff.—Plaintiff, a married woman, alleging her domicil in Virginia, sues the succession of her husband's father, on the following contract, and makes her husband's mother a party to the suit :

"Whereas, a marriage was consummated in the year 1852, between Nemours Pecquet, late of New Orleans, in the United States, and Catherine Ambler Moncure, daughter of Henry W. Moncure, of the city of Richmond, in the State of Virginia, in the said United States of America, of which marriage a daughter named Louise has been born, and on the celebration of the said marriage no marriage agreement or settlement was entered into. And whereas, since the said marriage, the said Henry W. Moncure, father of the said Catherine, has paid and advanced to his said daughter the sum of thirteen thousand five hundred dollars, which sum has gone into the hands of the said Nemours, her husband. And whereas, the said Henry W. Moncure is willing to advance the further sum of thirteen thousand five hundred dollars on the draft of the said Catherine, and in like manner to go into the hands of her said husband, but on the condition and with the express understanding that a guaranty shall be given, so as effectually to secure the said Catherine Pecquet and her said child, and any other children which may be born of her, to be realized and made available for her use, so that the annual interests on this said sum of twenty-seven thousand dollars shall be annually paid to her, through the agency of a trustee, on the death of her said husband, or in the event of his failure in business, so that she and her said child or children shall no longer receive at his hands a support necessary to her condition in life. And whereas, in consideration of the sums already advanced, and of the further sum of thirteen thousand five hundred dollars to be paid and advanced by the said Moncure as aforesaid, Louis Joseph Pecquet and Marie, his wife, now resident in Paris, in France, father and mother of the said Nemours, have agreed, and do by these presents agree and covenant with the said Catherine Ambler Pecquet and Louise, her child, and such other children as may be born of her, the said Catherine, that in the event of the death of the said Nemours Pecquet, or in case of his failure in business or becoming bankrupt, they, the said Louis Joseph Pecquet and Marie, his wife, will and do hereby guaranty the said sum of twenty-seven thousand dollars, to be paid to a trustee to be nominated by her, the said Catherine, and by him to be invested, and the annual interest of which is to be paid for the necessary support of her and her said children; her said husband, if alive, to participate thereof; but the said Louis Joseph Pecquet and Marie reserve the right, if either contingency above mentioned shall occur during their joint lives, that so long as he or she live, they may be permitted to pay six per cent. interest, on the said sum of twenty-seven thousand dollars, annually, for the purposes aforesaid, instead of paying the principal sum, and at the death of both of them the said sum, in money or property of equivalent value, shall be paid or conveyed to the said Catherine's trustee, for the purposes aforesaid. And it is further understood and agreed, that this guarantee shall cease

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PECQUET'S EX'N. to have any legal force and effect, if at any time during his life or by his testamentary dispositions at his death, the said Nemours shall have, by due and legal settlement, conveyed the said sum of twenty-seven thousand dollars to a trustee, for the use and benefit of the said Catherine and her child or children, in available funds, he not having failed in business during his life.

(PECQUET.)

MARIE PECQUET. [L. S.]
L. SOULIE. [L. S.]

Witnessed by W. S. Chase.

"Je soussigné, interprète-traducteur-juré, assermenté par la cour Impl. Paris et le Tribunal de Commerce de la Seine pour les langues Européennes, certifie, que le texte français ci-dessus est conforme au texte anglais écrit en regard et vice versa. En foi de quoi j'ai signé le présent à Paris ce vingt-quatre juin mil huit cent cinquante-quatre.

F. ARMFA.

Cinq lignes du texte anglais rayées comme nulles.

F. A.

Be it known, that on this 24th day of June, A. D. 1854, before me, D. K. McRae, consul of the United States of America at Paris, France, personally appeared Louis Joseph Pecquet and Marie, his wife, to me known to be the persons named in and who executed the foregoing instrument, and acknowledged that they severally executed the said instrument, for the uses and purposes therein mentioned.

D. K. McRAE, U. S. C.

The court authorized petitioner to sue.

Defendants excepted to the action on two grounds :

1. That the plaintiff cannot stand in judgment without the authorization of her husband, whose legal domicile is in France, and that the court of her domicile is the only court competent to authorize her to bring suit, after notice to her husband to state reasons why he refuses to authorize her.

2. That the petitioner shows no cause of action, because this action can not be maintained by the plaintiff before obtaining a separation of property from her husband, and on showing the utter impossibility to recover her matrimonial claims against him after a full discussion of his property.

The first exception gave the judge below much trouble and embarrassment, when, at the close of the term, June 27th, 1859, he ordered the exception to be continued. Afterwards, however, the plaintiff's husband was ruled to show cause why he should not authorize and assist his wife in bringing and maintaining this suit. This rule was served personally ; and no exception or answer to it having been filed, was regularly made absolute. The exceptions were thereupon dismissed; the second branch thereof having been virtually transferred to the merits.

The executor and widow Pecquet then answered by the general denial, and averred that the instrument sued on could have no effect whatever, either under French or Louisiana law, as it contained a substitution and a *fidei commissum* reprobated by law, and the stipulations therein contained never having been excepted or executed. Farther, that the contract, if

legal, could be satisfied by the payment of the interest; and lastly, plaintiff was without remedy for the reasons set forth in the second branch of exception, noticed above.

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Judgment was rendered against the succession of Pecquet *père* for \$13,500, with interest at six per cent. from June 1859, and against his widow for the like sum and the like interest; this judgment not to be executory for this principal so long as the said widow shall pay to the plaintiff an annual interest of six per cent. on the said amount (\$13,500), the defendants to pay the costs. Defendants appeal; there is a joinder in appeal and prayer to amend, in favor of plaintiff.

The facts of this case are as follows :

The plaintiff, Miss Moncure, married Pecquet *fils* in 1852, and was domiciled in Paris, where the husband carried on a commercial business. Miss Moncure's father advanced to his daughter, after her marriage, \$13,500, which went into the hands of Pecquet *fils* prior to 24th June, 1854. On the 5th of April, 1854, Pecquet *père* (whose succession is defendant) wrote a pressing letter to Miss Moncure's father, detailing the embarrassed circumstances, for want of money, of both Pecquets. His language is, "On the contrary, if you do not (let me draw on you) I will not be able to pay the debt, and will be protested, and be obliged to quit Paris before he gets here, etc. Thus, my dear Mr. Moncure, I beg of you to come to succor and secure the happiness of your children, etc., etc."

Urged in this impressive manner, plaintiff's father, acting in entire ignorance of the exact position of the affairs of Pecquet *père et fils*, consented to make a further advance of \$13,500 to his son-in-law, for his daughter's and grandchildren's benefit; and as he was compelled to rely upon the truth of the representations of Pecquet *fils*' business as made by Pecquet *père*, nothing was more reasonable than that Pecquet *père* should vouch for the entire safety of the advance, and the entire truth of his representations, by becoming personally responsible therefor.

With a parent's solicitude for the welfare of his child and grandchildren, and with a sincere desire that the money thus advanced should inure to their benefit, Moncure insisted upon the written guaranty herein sued upon, signed by Pecquet *père* and wife, and attested by the American consul. By this instrument Pecquet *père* and wife bound themselves to pay to plaintiff's trustee the \$27,000, to be invested, and the annual interest thereof to be paid for the necessary support of plaintiff and her said children, in the event of the death of her husband, or in case of his failure in business, or becoming bankrupt.

The letters and other proofs in evidence, and not excepted to, fully make out the happening of one of the conditions expressed in the contract. Plaintiff's husband has failed in his business, and plaintiff and her children no longer receive at his hands any support whatever.

The case presents the following questions for adjudication.

1. Was the lower court legally vested with jurisdiction over this suit?
2. Is the contract sued upon exigible under the jurisprudence of this State? Does it contain any substitution or *fidei commissum*, or is it in any way repugnant to good morals or public policy?
3. Has the condition happened on which the contract became executory?

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4. Is any acceptance of it on the part of plaintiff required?
5. Have Pecquet, husband and wife, bound themselves, in the contract, *in solido* towards plaintiff? or how are they liable?
6. From what date does interest run?
7. Was it necessary, before suing on the contract, for plaintiff to sue her husband and exhaust her recourse on him, before calling upon defendants?

1. The succession of Pecquet *père* having been regularly opened in the Second District court, any claim against it could be brought only in that tribunal. And by reference to Louisiana Code, 123 *et seq.*, and Code of Practice, 107, it will be seen that the judge was legally authorized to empower the plaintiff to sue, though the husband had positively inhibited her from so doing. The general rule of law undoubtedly is, that the court of the husband's domicile is the proper court to authorize the wife to sue. This applies, however, to courts under the same general jurisdiction: for instance, the courts of France, of Louisiana, of New York, etc.; and the principle then becomes equivalent to a plea of domicile, and is governed by the same rules. If Pecquet *fils*, when called upon to show cause why his wife should not be empowered by the court to sue, had urged his plea of domicile in some other parish of this State, then the rule would perhaps be applicable. But as he was domiciled elsewhere, and out of this State, the lower court properly authorized the wife to sue; and it was by no means necessary to go through the vain formality of citing the husband to show cause why she should not be authorized.

But what possible right have the defendants to urge this objection? They might, possibly, be authorized to rule the plaintiff to cancel the authorization of the judge, though we think the husband only has the right to complain; but they cannot except, for this would be as foolish as contending against the effect of the thing adjudged. See 88th rule in Equity, Laws United States courts, p. 499.

2. The legality of the contract sued upon is impugned, on the ground that it is contrary to public policy, because it contains a prohibited substitution and *fidei commissum*.

The proof of this proposition clearly devolves on the defendants; and even if the legality of the contract were doubtful, or presented a double aspect, one of which brings the case within, the other leaves it without the scope of prohibitory law, the contract will be sustained. 3 An. 157, 239, 494; 5 An. 619, 684.

Is there any provision of the *lex fori* or *lex loci* which strikes the contract with nullity? Both the laws of France and of Louisiana (Code Napoleon, 896, Louisiana Code, 1507) prohibited substitutions. But this contract contains no substitution; and defendants' counsel, thus far, has entirely failed to show in it any substitution or *fidei commissum*.

Viewed from the stand point of the laws of France, the contract is in direct conformity with the Code Napoleon 1048, which says:

“Les biens dont les pères et mères ont la faculté de disposer, pourront être par eux donnés, en tout ou en partie, à un ou plusieurs de leurs enfans par acte entre vifs ou testamentaires, avec la charge de rendre ces biens aux enfans nés ou à naître, au premier degré seulement, des dits donataires.”

And in the light of our own Code, the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one and the naked property to another, "shall not be considered a substitution, and shall be valid." Louisiana Code, 1508, 1509.

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Is there anything immoral, or contrary to public policy, the good order of society, or the institution of the family, for a father to love his daughter and her issue? This love is the cause of this contract. The desire to shield his daughter and her issue from the consequences of the natural or civil death of her husband, is the principal motive of the contract, definitely expressed therein, and this matter was "understood by both parties, reciprocally communicated, and resulting in both parties from a free and deliberate exercise of the will," at the time of signing the contract. We confess our entire inability to see anything wrong in this contract.

On the contrary, it seems to us in every way commendable, and in strict accordance with the spirit of our laws. It would indeed be singular if the laws of any civilized country should reprobate and stamp with nullity such a contract as the one now before this honorable court.

3. The conditions on which the contract should become executory are, "in the event of the death of the said Nemours Pecquet, or in case of his failure in business, or becoming bankrupt." The evidence clearly shows that Pecquet *filis* was utterly ruined before leaving France. Indeed, our adversaries do not seriously deny it, and are as anxious as ourselves that the case should be definitively disposed of.

4. The plaintiff has appointed her trustee under the contract, and has applied for the enforcement of it, by instituting this suit. No better acceptance can be required. This is an equitable action. Code of Practice, 35. The contract is for the advantage of a third person. Such third person may consent, at any time during the existence of the contract, to avail himself of the advantage stipulated in his favor. Louisiana Code, 1884. No better or more conclusive indication of this consent can exist than bringing suit to enforce the contract.

5. The lower judge considered the defendants liable jointly to the plaintiff, and so decreed.

It is true, the husband and wife both bind themselves by signing the act. The motive for this was probably to bring home to both their consent to the contract. It was important, in the judgment of him who advanced the \$27,000, to be able to show, at any time, that the guaranty was well known to both obligors, so that neither might resist complying with its obligations, on the ground of surprise, ignorance, illegality, etc., etc. But the presumption, both of French and Louisiana law, is, that married persons are in community of property (Code Napoleon, 1400; Louisiana Code, 2369); and if such be not the case, the fact must be shown by them. This has not been done here. If a community of property existed between the defendants, it was dissolved by the death of the husband, and his succession is liable for the totality of the debts of the community. This contract was clearly a contract of the community, and the husband, as the head of the community, owes the whole sum sued for to the creditor; that is, he is bound *solidairement*. 3 Troplong, Mariage, §§ 1771, 1772.

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And the same author explains, in the clearest manner, in the sections 1773, 1774, of the same work, that the wife is bound only for her half, unless she has consented *in solido*.

We have joined in the appeal, and prayed for an amendment of the judgment.

6. Plaintiff's original petition claimed interest from judicial demand. By a supplemental petition, interest was prayed for from 1st October, 1858, "when both the principal and interest of the claim set forth in the original petition became due and demandable."

We submit that, in conformity to the act of 1852, page 95, we are entitled to an amendment of the judgment of the lower court in this respect.

7. Defendants contend that they are securities for plaintiff's husband, and that they cannot be sued before plaintiff obtains a judgment of separation of property from her husband, and shows that the same cannot be satisfied by the sale of his share in the succession of his father, or by any other means.

This is virtually a plea that this suit is premature, and rests entirely upon the assumption that defendants are securities for the husband. If the assumption is false, the conclusion is false. Hence, the relations of the parties to this contract become a material point of inquiry.

The contract in question is between the plaintiff's father and the defendants. It was originally prepared in English, as appears on the face of it, and was translated into French by the interpreter of the Imperial court of Paris. It bears evident marks of having been drawn up by one familiar with the doctrine of trusts of the English and American law. As the contract must not be confounded with the instrument in writing by which it is witnessed (Louisiana Code, 1755), so your honors are bound to give legal effect to the contract according to the true intent of all the parties. Louisiana Code, 1940. By reading carefully the whole instrument, it clearly appears that Henry W. Moncreu advanced the \$27,000 to his daughter's husband, for the use and benefit of his daughter and her children; the children to have the ownership and their mother the usufruct. The obligation of the defendants is therefore to the plaintiff's children; and it is neither a contract of securityship by which they secure the payment of a debt due by their son (which, by the way, they had a legal right to do, if they so pleased), nor a penal or collateral obligation. On the contrary, the instrument in writing evidences, on the part of the defendants, a principal obligation, with a suspensive condition. (Louisiana Code, 2016, *et seq.*, 2038.) Their obligation is called a guaranty, it is true; but it is neither expressly nor impliedly a guaranty that they bind themselves for another already bound, and agree with the creditor to satisfy the obligation, if the debtor do not. It is a contract of guaranty that defendants will pay to a trustee for the wife and children \$27,000, in the event of the death, failure or bankruptcy of their son. The event happening, the defendants are bound purely and simply; or, as the lower judge expresses it, "The condition has arrived and their obligation is exigible."

Admitting, for argument, that defendants are mere securities for the husband towards the wife—a position, it seems to us, entirely opposed to the intention of all parties—we then enquire, what possible good could

be achieved by pursuing the course suggested by defendants' counsel? PECQUET v. M.
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Supposing the wife's suit was to result in a judgment for a smaller sum than \$27,000, would defendants be relieved *pro tanto*? We think not, because their obligation is primarily to the children, and not the wife. What benefit would accrue by liquidating the wife's claim on her husband, issuing execution, and getting a return of *nulla bona*? The proof is positive and uncontradicted, that the husband has left France permanently; that before he left he was "completely ruined." It would be worse than useless to insist upon such a course.

But if defendants are sureties for the husband toward the wife, and this suit is premature, this prematurity must result from some provision of law, which defeats our action in its present shape. But there is no such provision of law. If the husband be the principal debtor, and has not paid the claim, the action against the security is well founded, and must be sustained. Troplong, *Cautionnement*, § 231, 232.

The action may be delayed by the dilatory exception of discussion (Louisiana Code, 3014, 3015); but in this instance, this *legal favor accorded to securities* has been asked, without any compliance with the provisions of law, which are conditions precedent to its exercise. Louisiana Code, 3016; 11 La. 136; 7 An. 142, 621; 13 An. 196.

Besides, if defendants are sureties, they are entitled to a full subrogation to all the rights of the creditor. But defendants are silent as to what subrogation they desire. No matter to whose rights they are so entitled, whether to Moncure's, his daughter's or her children's, it is clear they must first pay the plaintiff's claim, before they can exercise the rights of the principal creditor against Pecquet *filis*. Whatever these rights may be, nothing intervenes to prevent a full subrogation. 12 An. 9.

But the contract is not one of suretyship, as we have before shown, but a principal, independent, contract, now exigible, and which we ask the court to enforce.

Jamin & Magne for defendants and appellants.—The plaintiff was married in 1852 to Pierre François Pecquet, designated in the family and throughout the evidence in this record by the name of Nemours Pecquet.

No marriage contract was entered into, but some time after the marriage, Henry W. Moncure, the plaintiff's father, made her a donation of \$13,500, which went into the hands of her husband, who was then residing with his wife, and engaged in commercial business, in Paris, in France.

On the 5th of April, 1854, Louis Joseph Pecquet, the father of plaintiff's husband, who also resided in Paris, wrote to plaintiff's father, the said Henry W. Moncure, representing that Nemours Pecquet was embarrassed in his business, in consequence of an impending commercial crisis, and the withdrawal of the usual credits of the bankers. He reminded Moncure of the promises he had made to Nemours in late letters, of pecuniary assistance; assured him that, by means of that assistance, Nemours would be able to sustain himself, and added that, in order to afford temporary relief to Nemours, he (the writer) had raised a loan of 25,000 francs, on mortgage, for three months, the repayment of which was out of his power without the assistance promised by Moncure to Nemours.

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Shortly afterwards, Moncure arrived in Paris. He agreed to advance to his daughter a further sum of \$13,500, to go, like the former gift of the same amount, into the hands of the husband, Nemours Pecquet, but on condition that a guaranty should be given by the father and mother of the husband, that in case of the death of the husband, or in the event of his failure in business, so that the wife and her child or children should no longer receive at his hands a support necessary to her condition in life, the annual interest on this sum of \$27,000, composed of the two advances of \$13,500 each, shall be annually paid to her, through the agency of a trustee. This proposition being accepted, Louis Joseph Pecquet and Marie Pecquet, the father and mother of the husband, agreed to "guarantee the said sum of \$27,000 to be paid to a trustee to be nominated by her (the plaintiff), and by him to be invested, and the annual interest of which is to be paid for the necessary support of her and her children; her husband, if alive, to participate thereof; but the said Louis Joseph and Marie Pecquet reserved the right, if either contingency above mentioned shall occur during their joint lives, that so long as he or she live, they may be permitted to pay one-half per cent. interest on the said sum of \$27,000, annually, for the purposes aforesaid, instead of paying the principal sum, and at the death of both of them, the said sum in money or property of equivalent value, shall be paid or conveyed to the said Catherine's trustee, for the purposes aforesaid."

This contract was executed at Paris, on the 24th of June, 1854, in two originals, one in English and the other in French, and the two originals were signed both by Louis Joseph Pecquet, and Marie, his wife.

The petition alleges that "one of the contingencies in the said act of guaranty has taken place, that her husband has failed in business, and is no longer able to render to the petitioner and her children a support necessary to her condition in life;" that her husband's father has died, leaving real estate in the State of Louisiana; that his succession has been opened in the Second District Court of New Orleans, and is administered by Ernest Quertier, of New Orleans, as dative testamentary executor; that the widow of the said Louis Pecquet, the other party to said act of guaranty, is also represented in this city by a special attorney in fact; that, in consequence of the above mentioned circumstances, the succession of said Louis Joseph Pecquet, and Marie Pecquet, his widow, are indebted in the said sum of \$27,000, with six per cent. interest. The petitioner further represents that her husband is absent from this State, and fails and refuses to authorize her to bring this suit; that he is unable to restore to her the said sum of \$27,000; that, inasmuch as the act of guaranty provides for the appointment of a trustee by herself, to whom the said sum is to be paid over for investment, she desires her father, the Henry W. Moncure, to be appointed for this purpose. She therefore prayed for judgment against the succession of her father-in-law and against her mother-in-law *in solido*, for \$27,000, with six per cent. interest, and that her father, the said Henry W. Moncure, be recognized and appointed trustee to carry out the provisions of the act of guaranty. The court authorized her to bring this suit, and when, afterwards, the plaintiff's husband came to this city, a rule was taken on him to show cause why he should not authorize her to prosecute this suit, or why, in default there-

of, the court should not grant the necessary authorization. The husband neither answered or appeared, and thereupon the rule was made absolute. PEQUET
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This suit was instituted on the 6th of June, 1859, but already, previously, the plaintiff had appointed her father trustee under the act of guaranty, by an instrument executed at Richmond, Virginia, on the 18th of May, 1859. This appointment is, of course, a nullity, because it was not authorized by her husband, who, as the document itself shows, then resided in Richmond with his wife. By a letter dated at Richmond, the 11th of May, 1859, and written when this deed was in course of preparation, but not yet executed, to his father-in-law, the plaintiff's husband in respectful but firm language objected to his wife's claim under the act of guaranty, and gives his reasons for it, which, whatever their weight may be in law, are entitled to our sympathy and respect.

The defendants excepted to the claim set up in the petition, on the ground "that the plaintiff shows no cause of action, because this action cannot be maintained by the plaintiff before obtaining a separation of property from her husband, and on showing the utter impossibility to recover her matrimonial claims against him after a full discussion of his property."

And this exception having been overruled, the defendants said, for answer, that "the instrument upon which this suit is brought can have no effect whatever, either under our laws or the laws of France, same containing a substitution and a *fidei commissum* reprobated by law.

They further aver that if the said contract was binding in law, the same does not entitle the plaintiff to the relief claimed by her, nor to any relief, except to claim the interest stipulated, etc., etc., etc., after obtaining a judgment of separation of property, and showing that the contingences contemplated in the said instrument (the deed of guaranty) have occurred.

What is the true character of the instrument sued on, and called by the plaintiff's counsel "an act of guaranty?" Here is the opinion of the district judge upon it: he says, "This instrument is the most extraordinary one which it has ever been my fortune to see. If it had been drawn up with the express intention of presenting a puzzle to the tribunals, its author could not have succeeded better." Such incongruities are a very common result, when contracts which are to be executed in civil law countries are drawn up, as this was, by common law lawyers. The ruling idea of this act is the appointment of a trustee, who is to stand forever between the husband and wife. Such trusts are contrary to the policy of our law, and are reputed as not written. The act in question evidences a donation by a father to his married daughter and her children, coupled with provisions to secure the gift to the donee beyond contingencies. Precisely such a case was before this court in 1857; *Partee, Trustee, etc., v. The Succession of H. R. W. Hill*, 12 An. 767. In that case H. R. W. Hill had bequeathed to his niece \$40,000, and appointed trustees to invest the same, and pay her annually the interest. The court said, "it is clear the bequest was to Mary R. Todd, wife of Sterling H. Lester, and her alone. No interest in this legacy was to vest in any one else. If the clause referring to the trustees be considered as mandatory, in other words, as a condition or mode of clogging the title of Mrs.

PECQUET v. PROQUET'S EX'RS. Lester, then it is void and must be considered as not written. New titles cannot be invented by testators. Absolute ownership bequeathed to a specific person cannot be crippled by the appointment of supervisors of a class unknown to our laws, who shall, for the period of their lives, keep the owner out of possession against his will, and manage for him what he is capable of managing for himself. *Fidei commissa*, the trusts of the English law cannot be created in Louisiana and enforced in our courts. C. C. 1506, 1507. *Clague's Widow v. Clague's Executor*, 13 La. 7; *Harper v. Stanborough*, 2 An. 381; *Succession of Franklin*, 7 An. 12. If the clause concerning the trustees be regarded as advisory merely, it need not be expunged from the will. If the legatee had chosen to avail herself of the testator's recommendation, Partee might have sued, for acquiescence would have made him her agent, and he would have derived his powers from her, and not from the mere force of the testator's will."

This is precisely the case before the court. If the appointment of a trustee, required by the act of guaranty was intended to be obligatory, it is contrary to the policy of our and the French law, and "must be considered as not written." If this clause was intended as advisory, it is a recommendation, which imposes no legal obligation on the plaintiff. She may appoint a trustee, but he is simply her agent, who derives no authority from the act of guaranty, and she may, whenever she pleases, change him, or dispense with the assistance of a trustee altogether."

It is thus that this attempted trust was viewed by the District Court. The plaintiff had appointed her father her trustee under the act, by a deed executed at Richmond; but this appointment not having been authorized by her husband, was null and void. In her petition, the plaintiff prays that "her father be recognized and appointed her trustee, to carry out the provisions of the act of guaranty"; but although the plaintiff could certainly have made no more appropriate selection, yet the court ignored this request entirely, and gave judgment in favor of the plaintiff herself for a part of her demand. The court based its decision upon the case in the 12th Annual, above referred to, and very properly considered that it was no part of the functions of the court to select an agent for her in opposition to her husband's wishes, who objects to the appointment of any trustee whatever.

The irreconcilable conflict of the act of guaranty with our laws, is apparent in another aspect. The sum of \$27,000 was advanced by the plaintiff's father, expressly "to go into the hands of her husband," and therefore to be used by him in his commercial business.

What was really donated, was a debt contracted by the husband, which he was to return to her or her children, and this return was guaranteed by the husband's father and mother. This donation was made to the plaintiff and her child, and any other children which may be born of her; the annual interest to be paid to her. The plaintiff, according to the intention of the act of guaranty, had only a right to the interest; the principal to be preserved, through the agency of a trustee, for her child or children. That act shows, that at its date, the plaintiff had one child. It is probable that, as far as that child is concerned, this disposition might be allowable under Art. 1509 C. C., which declares "that a dispo-

sition *inter vivos* or *mortis causa*, by which the usufruct is given to one and the naked property to another, is not to be considered as a substitution, and shall be valid." But under the decision in *Rachal v. Rachal*, 1 Rob. 115, if other children have been or may be born of the plaintiff since the date of the act of donation and guaranty, it would be held to be a prohibited substitution. Of this fact, however, the record affords no evidence. These principles are so familiar and well settled in our jurisprudence, that an attempt further to illustrate them would be a misuse of the time of the court.

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Again, the act of donation and guaranty directs the appointment of a trustee, who is to invest and keep the principal debt for the benefit of the child or children, who have a right to claim it from the trustee only after their mother's death. This, under the authority of the decision in *Clague's Widow v. Clague's Executor*, 13 La. 7, is a "*fidei commissum* or trust which the law forbids," and is an infringement of the parental authority of both the father and the mother of the child or children, to whom the law confides the administration of the property of the children. C. C. 239. The attempt of putting a trustee over the authority of the father has never been made in Louisiana, so far as the Reports inform us, and would not be successful, if made. Nor can such a deed of trust impair the husband's authority, by compelling him to allow his wife to choose an agent or trustee without his consent and contrary to his advice. Nor can courts of justice thus interfere with the husband's rights in this respect. The courts may authorize the wife to sue; but after she has obtained judgment, she cannot receive or claim and invest the money without the husband's consent, nor do through an agent what she cannot do herself.

The attempted appointment of a trustee, under the act of donation and guaranty, thus falling to the ground, as well as the unauthorized appointment by the plaintiff, the inquiry presents itself, whether the authorization of the court to bring this suit can supply this defect. Under the authority of Art. 126 C. C. and 107 C. P., courts generally grant such authorization upon the most superficial examination, particularly when, as in this case, the husband is stated to be absent.

But when, upon the introduction of the evidence, it appears that the husband's refusal to authorize the institution of the suit is firm and persistent, and that the authorization to bring the suit is ineffectual and nugatory, unless followed up by the husband's consent to the appointment of a trustee to carry out the judgment, if obtained, or to receive and invest the amount of the judgment, which consent and authorization the court cannot give in the place of the husband, then the question arises whether the court should not abstain from deciding a case in which its judgment could produce no effect, unless the husband's assent is obtained by extra-judicial means? *Aikins v. Coward*, 9 An. p. 12.

To relieve herself from this dilemma, the wife must pursue the remedy pointed out by act 126 of the C. C., and art. 106 of the C. Pr. It is known that no ground exists in this case for this extreme remedy, and hence it follows that the prosecution of this suit, contrary to the husband's wishes, is an impossibility.

This suit is a controversy arising out of family settlements. But, for-

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fortunately, unlike most of the suits springing from a similar cause, it presents none of the painful features of recrimination and bad feeling, which so often call upon the interference of courts in matters that ought to be hidden from the public eye. The motives of all the parties are respectable. The father-in-law, by whose guidance the daughter naturally is governed, acts from prudential motives for the welfare of his child and her offspring; the husband from motives highly honorable, in disregard of the immediate advantage of himself and his wife, and child and children.

The truth of these assertions depends upon the evidence in the record, which will also determine whether our objection to the institution of this suit, on account of the husband's dissent, is well founded. It is difficult to separate the examination of this question from that of various questions arising on the merits of the case, if this exception should be overruled. We shall therefore enter upon the examination of the merits of the case, with a request that the court will also notice the bearing of the evidence upon the exception we have taken to the insufficiency of the authority to institute this suit.

The guaranty of Louis Joseph Pecquet and his wife, the father and mother of plaintiff's husband, was to take place only upon the death of her husband, or in the event of his failure in business, or becoming bankrupt, so that she and her said child and children shall no longer receive, at his hands, a support necessary to her condition in life. On this subject we find two kinds of evidence in the record. The first is evidence of a doubtful character; the second, of a character very unusual, when third persons are to be effected.

To prove the husband's insolvency, the plaintiff examined three witnesses: *Ernest Quartier*, *Charles Lafitte*, and *Jules Levita*, the latter in Paris, under a commission. The first of these witnesses says that Nemours Pecquet told him, that he had been in business in France, that he had settled all his affairs without going into court, and never failed. The witness understood Nemours to say, that he had never been put into court, and had made an amicable settlement with his creditors. The witness does not know why Nemours Pecquet returned to this country.

This testimony is corroborated by *Lafitte*, who adds nothing to it.

Levita, of Paris, was employed by the late John Y. Mason, the minister of the United States in Paris, to make enquiries concerning the business position of Nemours Pecquet, whom he never knew personally. He knows, from reputation, that such a person as Pierre François (alias Nemours Pecquet) was, at some time in Paris, engaged in commercial business. From reputation, his credit was good in the commencement; but the witness believes, though he is not certain, that he afterwards went to protest; he became embarrassed, but did not fail. The witness knows no detail of dates. When he was protested, continues this witness, he called his creditors together, without any judicial authority, and the witness heard he had compromised at forty or sixty per cent.; but the witness again knows nothing of the details. He thinks, however, he (Nemours Pecquet) left France on account of his "bad affairs," and that he was embarrassed, but cannot say whether he could have continued in business or not. His credit was of course weakened, but the witness does not

know what his resources were. On cross-examination, he said that the facts testified to were derived from others. It is then merely hearsay evidence. Rocheford says that Nemours Pecquet is now a cotton broker in New Orleans, in partnership with Pench, which is a branch of business not requiring much capital; that he lives in furnished lodgings, and takes his meals at a restaurant.

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The deposition of Levita, which was taken in France, was objected to by the defendants, and an entry on the minutes shows that the court was to pass on what was hearsay testimony. Now the whole of Levita's deposition is evidently hearsay.

The deposition of Quertier, Lafitte and Rotchford were taken by consent, and a further entry on the minutes says that "the court will pass upon the admissibility of this evidence, as objected to by the defendants, as being hearsay evidence, and as being declarations of a husband in favor of his wife, and the right of either party to except is reserved." The court did not decide on the admissibility of the evidence during the trial, but took the case under advisement, and decided it with reliance upon this evidence, thus impliedly admitting it. After a judgment on the merits, there was no opportunity for taking a bill of exceptions, nor was there any necessity for it, for the objections are specifically stated in the entry on the minutes.

But if all the testimony hitherto spoken of was clearly admissible, what would it amount to? Does it prove, in the words of the act of guaranty, "that the plaintiff's husband has failed in business, so that she and her said child or children can no longer receive at his hands a support necessary to her condition in life?" And this is the proposition which the plaintiff has to establish affirmatively, before the responsibility of her father or mother-in-law attaches; this is the condition of the bond. The failure of a business man is a substantive fact very easily established by those who had business transactions with him at the domicile of his establishment. Embarrassed traders always have creditors, and generally numerous creditors, who have a personal knowledge of the circumstances of their debtor, and the settlements they have made with him. Instead of procuring such direct testimony, if in existence, the plaintiff has relied upon the declarations of her husband to Messrs. Quertier and Lafitte, and upon the loose information collected by Levita in Paris; and all these witnesses say that Nemours Pecquet had not failed: and so the condition of the bond is not broken and this suit must fall to the ground. The bond contemplated a total failure, which would incapacitate the husband from supporting his wife and child or children. There has not been even an attempt to show such incapacity. Nothing in the record shows that the family suffered from want, or whence their means of support were derived. That the husband exchanged his French business for another kind of commercial business in his native country may lead to the supposition that he did not find his former business as profitable as the new business in which he has engaged since the institution of this suit, but is certainly no evidence of that utter inability to support his family, which is the contingency upon which the responsibility of his parent attaches. The District court seemed to consider the character of that business a proof of his discomfiture.

PECQUET A court sitting in this city, where so many fortunes have been made in
PECQUET'S EXR. the cotton brokerage, will certainly not listen to the assertion that, if a man is a cotton broker, it is a proof that he cannot support a small family.

But the above mentioned is not the only evidence upon which the plaintiff relies. Her counsel have introduced two letters from Nemours Pecquet to the plaintiff's father: one of the 21st July, 1858, the other the 11th May, 1859, and a letter from Paul Pecquet to the same gentleman, of the 25th October, 1858. Paul Pecquet is the brother of Nemours Pecquet, and his wife is the sister of the plaintiff. An entry made by the clerk during the trial shows that these letters "were offered by the plaintiff, but not filed, and objected to by defendants, on the ground that they are declarations of a son against his mother, the declarations of a husband in favor of his wife; that the letter of Paul Pecquet is hearsay. The right of either party to a bill of exceptions was reserved by the court, and the court was to pass upon the admissibility of the evidence."

We find in the record that these letters were filed on the 8th March, 1860, the day of the trial of the case, "*nunc pro tunc*," which, we presume, must be understood to mean that the judge, when making out the judgment, considered them as proper evidence, and delivered them to the clerk together with the judgment. It would have been irregular to have prepared bills of exception after judgment, nor was there any necessity for it, as the specific objection to the reception of these letters was already spread on the record.

It is obvious that, as husband and wife cannot be witnesses for or against one another (C. C. 2260), the husband's declarations, whether verbal or written, cannot be received for or against her. It must be supposed that those letters were, by the plaintiff's counsel, considered good evidence in her favor, for otherwise they would not have offered them; and for this very reason they should be rejected.

As, however, these letters are the principal basis of the judgment of the district court, we shall examine their contents as if they had been made evidence by consent of parties.

On the 21st July, 1858, Nemours Pecquet writes to his father-in-law:

"I am completely ruined by the last commercial crisis. From all appearances, I shall have nothing from my father, and I never will consent to ask my family to pay 7,500 francs income, for I should consider that indelicate. What I can do without injuring any one is what I stated in my last letter. By annulling your act you relieve my family from an enormous charge; but, at the same time, I shall ask my mother to give me \$10,000, not on account of the actual (the father's) succession, but on account of what I may inherit from my mother; for, with these \$10,000, I could buy a charge de courtier de change, which will enable me to support my family and to pay interest to my mother, if required. I hope you will consent to send me the act. My position is very disagreeable. The little that is left me is going every day. None of my family know my position, and I beg you not to say anything about me to any one."

This is the substance of the letter, nearly in the writer's own words. This letter seems to have been written from Paris.

The next letter in date is that written by Paul Pecquet to Moncure,

who, as has been stated, is the father-in-law of both Nemours and Paul Pecquet. It is dated Paris, October 25, 1858. This letter begins thus: PECQUET
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 "Great was my surprise when I received Nemours' call, a few days ago, for the purpose of ascertaining the validity of my parent's guaranty. Very great was my astonishment, for this was the first intimation of his distress: for the first time I heard that he was ruined and broken. I made inquiries of him, the result of which I shall proceed to communicate to you: It seems that, for years past, both Nemours and Kate were aware of the impossibility of carrying on their business successfully, and that, for the avowed and sole purpose of keeping the truth from my father, they calmly sank dollar after dollar, until the last was gone beyond redemption, knowing well the result of such a course would be finally to charge the estate with reimbursement of \$25,000 by you advanced. The only excuse given by Nemours for this act of folly is, that the knowledge of such a fact brought home to my father would instantly have killed him. This conduct I will not pretend to qualify; but, this much I will say, his feelings and sentiments upon the subject have placed him in this cruel dilemma, either to kill his father or wrong his co-heirs. He has chosen the latter alternative, which might have been avoided in a measure if he had consulted with us; had Kate mentioned the fact to her sister; had she given you a hint at the time you were here, something might have been done to have saved what remained from destruction. I say they took upon themselves this responsibility, and, having acted thus, with a full knowledge of the consequences, it may be they should support them alone. * * * I wish to place the blame where it attaches, and dispel all idea of complicity on the part of my father. He died without the slightest suspicion of the reality."

Paul Pecquet then gives his opinion of the legal character and inherent defects of the act of guaranty, and proceeds to say: This case presents this very strange feature, *i. e.*, whatever is done to enforce the act for the benefit of Kate and Nemours, will be greatly detrimental to Bettie (the writer's wife) and myself; for this claim absorbing the assets of the succession, nothing more to be left for us."

He then speaks of a letter which Kate and Nemours had received from Moncure, advising them to postpone their departure from France until April; but adds, that Bettie and himself had advised them to depart without delay for Brazil—that the "Brazilian Emigration Company," a most promising enterprise, had tendered him an employment as surveyor or engineer; that by going there he would be sure of a salary of 20,000 to 30,000 francs, besides what he might earn from private land holders or from a connection with a contemplated railroad; that Kate is delighted at the idea of living in a warm climate; that it would be necessary for Nemours to spend some time in Washington City, to study the American land system; and that, in order that he might go to work at once, they had determined to leave France on the 16th of the next month. He finally says that he has read this letter to Nemours and Kate, who admitted the truth of all his assertions. Then follows another letter, probably on the same sheet of paper, evidently written by Mme. Paul Pecquet (Bettie Moncure), corroborating her husband's statements.

The last letter is one from Nemours Pecquet to Moncure, dated Rich-

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This correspondence discloses the distress of mind of a man who, unsuccessful in his commercial business, has lost everything except his courage and his honorable feelings. He feels his capacity for useful exertion, and is burning with a desire to enter upon a new career of usefulness. He implores his father-in-law to use his influence and position to procure him any kind of honest employment. He and his wife are willing to expatriate themselves and go to a distant and little known country, because it opens to them the prospect of advantageous employment in his profession of engineer. He assures his father-in-law that if the act of guaranty, which disturbs the peace of his family, is given up, his mother will advance to him, on account of her future succession, a sum of \$10,000, with which he can begin life anew, even in France. He is ready to submit to any privation rather than to sanction a suit by his wife against his own family, although by the terms of the act he would immediately participate in the fruits of this suit; he considers such a course as dishonorable and as productive of distress to his father's family, and the cause of irreconcilable dissensions between them. It must be observed that there is not in the evidence the least charge of misconduct or incapacity against Nemours Pecquet. His commercial business evidently proved unprofitable from the incidents inseparable from that class of pursuits. He settled amicably with all his creditors, without the least difficulty. He was not troubled by any of them afterwards, and was eager to begin a new life of usefulness. Many thousands of worthy men in this community have been in similar and worse predicaments, and have afterwards attained wealth and risen to eminence. Such men, in the full vigor of their faculties, impelled by affection for their families, and chastened by experience, cannot be considered, in a country like this, and in the words of the act of guaranty, "unable to afford a support to their families." A capital yielding an annual interest of \$1,620, is a much inferior guaranty for the support of a family, than the character and disposition evinced by Nemours Pecquet in these transactions.

But the father-in-law evidently had less confidence in Nemours's prospects than he had himself, and this suit was brought.

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These considerations are applicable only if the above mentioned three letters are held to be legal evidence, which it is difficult to maintain. If they are rejected, the plaintiff's case is without evidence, and must entirely fail.

But if these letters are admitted as evidence, and the court should be of opinion that the facts disclosed in them establish the existence of the contingencies under which the responsibility of Louis Joseph Pecquet's estate and his widow, under the act of guaranty, attaches, then the whole contents of these letters must be taken as true (19 La. 482). And the next question would be, what is the extent of the liability of the deceased parent, and what the liability of the surviving parent? The District court assumed that the death of the father authorized the plaintiff to claim at once half of the sum guaranteed from his estate; but that the surviving mother had a right to postpone the payment of her half of the sum guaranteed during her life time, on the annual payment of interest at six per cent. But the District court evidently overlooked an important part of the act of guaranty, which is in these words, viz :

"But the said Louis Joseph Pecquet and Marie reserve the right, if either contingency above mentioned (that is, the death or bankruptcy of Nemours Pecquet) shall occur during their joint lives; that so long as he or she shall live, they may be permitted to pay six per cent. interest on the said sum of \$27,000, annually, for the purposes aforesaid, instead of paying the principal sum. And at the death of both of them, the said sum shall be in money or property of equivalent value be paid or conveyed to the said Catharine's trustee for the purposes aforesaid."

Now it was the obvious duty of the obligees in the bond to show affirmatively the date of the event which authorized her claim to the principal instead of the interest, viz : that the failure of her husband occurred after the death of his father. The petition states that the father died on the 19th of September, 1857; and the letter of Paul Pecquet, of October 25, 1858, which is evidence in all its parts, unless all the letters are rejected, and which was read to both the plaintiff and her husband, and then admitted by them to state the truth, declares positively "that for years past, both Nemours and Kate (the plaintiff) were aware of the impossibility of carrying on their business successfully, and that for the avowed and sole purpose of keeping the truth from my (the writer's) father, they calmly sank dollar after dollar until the last was gone beyond redemption. * * * The only excuse given by Nemours for this act of folly is, that the knowledge of such a fact brought home to my father would instantly have killed him." He adds, that his father died without knowing anything of Nemours' distressing condition.

For the reasons stated in this view of the case, the defendants submit that the plaintiff's petition should be dismissed, or, at least, that if judgment should be given in her favor upon the bond of guaranty, it should be restricted to the annual payment of six per cent. interest upon \$27,000, one-half to be borne by the estate of Louis Joseph Pecquet, and the other half by his widow.

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I. The instrument sued on is, according to plaintiff, a donation *inter vivos*. If so, it is null and void: 1. As not being evidenced by a notarial act. C. C. 1523, 1525; *Barrière v. Gladding's Curator*, 17 La. 146; *Miller v. Andrus*, 1 An. 237. 2 As not being accepted by the plaintiff with her husband's authorization. C. C. 1532. 3. As containing a *fidei commissum* in favor of a trustee and a substitution in favor of plaintiff's children, born and unborn, which are provisions or conditions contrary to, and reprobated by, the policy of our law. C. C. 1506, 1507.

It is true that impossible conditions are reputed not written in donation *inter vivos* and *mortis causa*. C. C. 1506. But this rule applies only to impossible conditions generally, and not to those which are specially pointed out by law as vitiating the gift itself. Thus, in Art. C. C. 1507, we see "that substitution and *fidei commissum* are prohibited, and that the disposition itself is null and void." Hence the inference appears to us irresistible that a *fidei commissum*, or trust, vitiates a donation or a will as well as a substitution; and that in deciding that *fidei commissum* were merely to be reputed not written, the courts, with due respect and deference, have mistaken and misapplied the law.

We are told that the substitution in favor of children and grandchildren is binding under the French law, which must govern the parties in this case, France being the *lex loci contractus*. To this we answer, 1. That the provisions of the French law, on this head (Arts. 1048 to 1074 Napoleon Code), are not to be found in our own Code, having been left out of it *ex industria*; and that provisions contrary to the policy of our law cannot be enforced here. C. C. 1507. *Penny v. Christmas*, 7 Rob. 482; *Harper v. Stambrough*, 2 An. 377; *Lee v. His Creditors*, 2 An. 599. 1. Félix, Droit international privé, p. 216, No. 99. 2. That as to the appointment of a trustee, which is a *fidei commissum*, so called in the very instrument sued on, it vitiates the gift as contrary to law and public policy, and as being in derogation of the marital power. *Vaughan v. Christine*, 3 An. 329; and, 3. That the other radical defects, above pointed out, stamp the instrument with an indelible mark of nullity.

Again, we are told that the usufruct may be given to one, and the naked property to another. Granted; but the text of the instrument sued on resists to this interpretation given to it by plaintiff. Could the property be given to unborn children? Clearly not. C. C. 1469.

Besides, if the French law were to govern this case, the instrument, being made under private signature, should be void, because not signed by Moncure, and because not made in duplicate original. Nap. Code Art. 1325.

II. But the instrument sued on is not a donation. C. C. 1454. In fact, Moncure paid money to his son-in-law unconditionally, for the first sum of \$13,500 and for the second sum of \$13,500 gave, or authorized to draw a draft on his house, on the condition that the father and mother of his said son-in-law would secure to his daughter and grandchildren, born and unborn, in certain contingencies, certain advantages specified in said instrument. What is it then? We think that it is a contract *sui generis*, *do ut des*. At all events, it is a contract, and not a donation; and the conditions to pay to a trustee who is himself directed to invest the funds and serve the interest thereof to the wife (the plaintiff) and then,

after her death, to her children, born and unborn, are clearly impossible conditions contrary to law, and which vitiate the contract itself, as well in France as here. Napoleon Code 1172; La. Code 2026. Larombière, whose recent work on Obligations stands very high, commenting on this Art. 1172, says: "Toute condition d'une chose contraire aux bonnes mœurs, à l'ordre public, ou prohibée par la loi, rend également nulle la convention à laquelle elle est apposée." 2 Larombière, Obligations, p. 33; 1 Poujol, Obligations, p. 379 et suiv.; 6 Touillier, No 479 et suiv.

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Our Art. 2026 reads thus: "Every condition of a thing impossible or *contra bonos mores* (repugnant to moral conduct) or prohibited by law, is null, and renders void the agreement which depends on it." And Story, Equity Jurisprudence, vol. 2, p. 731, No. 1303, says: "In regard to contracts, if they stipulate to do anything against law, or against the policy of the law, they are treated, at the common law, as void."

So that, in whatever light the instrument sued on be considered, and whether it be called a donation, a suretyship, a warranty, or any other kind of contract, it is an absolute nullity and cannot produce any effect.

And supposing, for the sake of the argument, the instrument to be binding, and supposing all the exceptions and defences, heretofore presented, unavailing, still, the present action should be dismissed, if we are not mistaken, for this reason, that by the *lex loci contractus*, invoked by the plaintiff, the sums received by the husband from his father-in-law fall into the community. Nap. Code, 1401; and, consequently, the husband alone would have the right to sue; so that this suit, instituted by the wife for a debt due to the community, if due at all, is an absolute nullity, and should be dismissed. Nap. C. 1421; La. C. 2373.

To sum up, and in addition to the conclusions of our original brief:

1. The instrument sued on is an absolute nullity, and cannot give any cause of action.
2. Supposing, for argument sake, the instrument to be binding, the sum stipulated therein cannot be claimed, in whole or in part, until both L. J. Pecquet and his wife are dead.
3. According to the *lex loci contractus*, invoked by plaintiff, the debt, if there be any in contemplation of law, which is denied, should be due to the community, and as such, could only be sued for by the husband. C. C. 2373; N. C. 1421.
4. The hearsay evidence, the declarations of the husband in favor of his wife and of the son against his mother, being left out, as they should be, the plaintiff has not made out her case, supposing that she had any right of action.
5. There is no solidarity in the pretended obligation, and the solidarity cannot be presumed. C. C. 2088. The quotation of plaintiff from 3 Trop-long, Mariage, §§ 1771 to 1774, are based on Art. 1484 of the N. C. which is not to be found in our law; and, therefore, have no application. Besides, supposing that doctrine to be correct, which is denied, the plaintiff would have waived her right by suing both the succession of L. J. Pecquet and his surviving wife jointly, instead of suing the succession for the whole.

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ILSLEY, J. The present suit was instituted in the Second District Court of New Orleans, and grows out of the instrument which is herein transcribed from the record :

"Whereas, a marriage was consummated in the year 1852, between Nemours Pecquet, late of New Orleans, in the United States, and Catherine Ambler Moncure, daughter of Henry W. Moncure, of the city of Richmond, in the State of Virginia, in the said United States of America, of which marriage a daughter named Louise has been born, and on the celebration of the said marriage no marriage agreement or settlement was entered into.

And whereas, since the said marriage, the said Henry W. Moncure, father of the said Catherine, has paid and advanced to his said daughter the sum of thirteen thousand five hundred dollars, which sum has gone into the hands of the said Nemours, her husband.

And whereas, the said Henry W. Moncure is willing to advance the further sum of thirteen thousand five hundred dollars on the draft of the said Catherine, and in like manner to go into the hands of her said husband, but on the condition and with the express understanding that a guaranty shall be given, so as effectually to secure the said Catherine Pecquet and her said child, and any other children which may be born of her, to be realized and made available for her use, so that the annual interests on this said sum of twenty-seven thousand dollars shall be annually paid to her, through the agency of a trustee, on the death of her said husband, or in the event of his failure in business, so that she and her said child or children shall no longer receive at his hands a support necessary to her condition in life.

And whereas, in consideration of the sums already advanced, and of the further sum of thirteen thousand five hundred dollars to be paid and advanced by the said Moncure as aforesaid, Louis Joseph Pecquet and Marie, his wife, now resident in Paris, in France, father and mother of the said Nemours, have agreed, and do by these presents agree and covenant with the said Catherine Ambler Pecquet and Louise, her child, and such other children as may be born of her, the said Catherine, that, in the event of the death of the said Nemours Pecquet, or in case of his failure in business or becoming bankrupt, they, the said Louis Joseph Pecquet and Marie, his wife, will and do hereby guaranty the said sum of twenty-seven thousand dollars, to be paid to a trustee to be nominated by her, the said Catherine, and by him to be invested, and the annual interest of which is to be paid for the necessary support of her and her said children; her said husband, if alive, to participate thereof; but the said Louis Joseph Pecquet and Marie reserve the right, if either contingency above mentioned shall occur during their joint lives, that, so long as he or she live, they may be permitted to pay six per cent. interest on the said sum of twenty-seven thousand dollars, annually, for the purposes aforesaid, instead of paying the principal sum, and at the death of both of them the said sum, in money or property of equivalent value, shall be paid or conveyed to the said Catherine's trustee, for the purposes aforesaid. And it is further understood and agreed, that this guarantee shall cease to have any legal force and effect, if, at any time during his life or by his testamentary dispositions at his death, the said Nemours shall have,

by due and legal settlement, conveyed the said sum of twenty-seven thousand dollars to a trustee, for the use and benefit of the said Catherine and her child or children, in available funds, he not having failed in business during his life."

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Mrs. Catherine Ambler Pecquet, wife of Nemours Pecquet, duly authorized to institute and maintain her action, claims from the (concillary) succession of her father-in-law, Louis Joseph Pecquet, opened in New Orleans, and from Mrs. Marie Pecquet, his widow, represented by her agent and attorney in fact, *in solido*, the whole sum of twenty-seven thousand dollars, with interest at the rate of six per cent. per annum, from the 1st day of October, 1858, averring that the obligation assumed by the defendants has become absolute, by the happening of one of the events or contingencies in the said instrument stipulated, viz: her husband's failure in business or bankruptcy.

She prays that her father, Henry W. Moncure, be recognized and appointed her agent and trustee, to carry out the provisions of the said act of guaranty.

In default of the authorization and assistance of the plaintiff's husband in the prosecution of her claim, notwithstanding due legal personal notice on him to that effect, she was properly authorized by the court to stand in judgment.

See Articles 106, 107, C. P.; 123, 126 C. C.; *Bruy v. Bynum*, 2 A. 279; *Villeneuve, Leblanc et al. v. Dubuca and wife*, 6 A. 360.

The defendant filed an exception to the effect that the petitioner showed no cause of action, because this action cannot be maintained by the plaintiff before obtaining a separation of property from her husband, and on showing the utter impossibility to recover her matrimonial claims against him after a full discussion of his property.

This exception was properly transferred to and acted upon in the examination of the merits, blended as it is with the vexed and complicated questions which the contract presents.

The separate answer of each of the defendants was substantially the same. It pleaded the general issue, and averred that the written instrument on which the suit was based can have no effect whatever, either under our laws or under the laws of France, the same containing a substitution and *fidei commissum*, reprobated by law, and the stipulation therein contained never having been accepted or executed.

That, even if the said contract was binding in law, the same does not entitle the plaintiff to the remedy claimed by her, nor to any remedy, except to claim the payment of the interest stipulated in the said instrument, after showing that the sum of money therein mentioned has been paid by her father in the manner therein stipulated; and after obtaining a judgment of separation of property from her husband and discussing all his property, and showing that the contingencies stipulated in said instrument have occurred; that she is legally authorized to bring this suit, and that her husband has lost all control on her rights and property. All of which the respondents specially deny.

On the trial of the case in the court below, certain evidence was offered by the plaintiff, very material in its bearing on the result of this controversy. In the note of evidence is the following entry: "Plaintiff also

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offers testimony taken in France, the court to pass upon what point is hearsay evidence; also testimony taken by consent, this day now filed. The court will pass upon the admissibility of the evidence as objected to by the defendants, as being hearsay evidence, as being declarations of a husband in favor of his wife, and the right of either party to except, is reserved.

The letters of Nemours Pecquet and one of Paul Pecquet, all offered by plaintiff, but not filed, and objected to by defendants, on the ground that they are declarations of a son against his mother; the declarations of a husband in favor of his wife; that the letter of Paul Pecquet is hearsay.

The right of either party to a bill of exceptions is reserved by the court, and the court to pass upon the admissibility of the evidence."

It was upon this testimony alone that the happening of the event, which was to fix the liability of the defendants, was shown, if the contract was legally a valid one; and the court below received the evidence without expressing any opinion as to its legality, but thus tacitly overruled the objections to it.

The only mode pointed out by law to test, in this court, the correctness of the opinions of inferior courts, is by bill of exceptions, and none were taken. C. P. Art. 488; and in no other form can it revise such opinions. *Graugnard v. Lombard*, 14 An. 234.

It is only when the question decided is presented by the pleadings, that a bill of exceptions may be dispensed with. *Exchange Bank v. York*, 2 A. 139; *Scott v. Lawson*, 10 An. 547.

The judge *a quo*, after a very careful examination of the instrument sued on, and the testimony adduced, condemned the estate of Louis Joseph Pecquet to pay to the plaintiff the sum of thirteen thousand five hundred dollars, with interest, at the rate of six per cent. per annum, from judicial demand, 7th June, 1859; and also condemned Marie Pecquet, his widow, to pay to the said plaintiff a like sum of thirteen thousand five hundred dollars, with like interest.

This last judgment against Marie Pecquet to be executory only, if she fails to pay an annual interest of six per cent.; the costs of suit to be paid by the defendants.

It is very important, at the outset of the present investigation to determine whether the contract sued on, having been entered into in France, should be decided here by the laws of that country, although those laws have not been proved. And this suggests the broad question, whether the laws of France can be noticed by our courts without proof?

No principle is better established on the subject of the conflict of laws than this: that the laws of the place of the contract are those which govern it, unless such laws are expressly excluded, or the performance of the obligations growing out of it is to take place in some other country, where different regulations prevail.

It is a general rule of evidence that courts cannot notice the laws of a foreign state, unless they are proved as other facts; but may not, and do not, cases sometimes arise, in which this rule should be relaxed?

The law of evidence being the guide by which the truths of a cause should be ascertained and determined, any deviation from a well established

rule should never be sanctioned by courts, unless it is manifestly clear that such deviation can be wisely and discreetly made, and will tend to advance a cause and promote the ends of justice. An exception to a rule of evidence may seem not warranted by precedent, and were the rule a part of a system of precise legislation, it would hardly be sanctioned by law; but where such an exception is practically, on principle, useful and necessary, it becomes itself a precedent to be used in future cases.

As illustrative of the correctness of this doctrine, we find two cases reported in 1 Louisiana, *Malpica v. McKoun*, p. 254; and *Arage v. Carrell*, p. 532.

In both these cases the law of the place of the contract (Mexico), which was the Spanish law, had been the prevailing law of Louisiana, and the court therefore had judicial knowledge of the law of Spain.

The law of Spain was also noticed, without proof, in *Berlechaux v. Berlechaux*, reported in 7 La., at page 539, wherein the court observed: "Now, although the Spanish law has no longer any force in the State of Louisiana, since the repealing act of 1828, yet having been considered previously the law of this country, so far as it was not abrogated or altered by statutory enactments, we may still, without violation of the rule which requires foreign laws to be proved as facts, assume some knowledge of it."

Connecting Art. 3521 of our Civil Code with the repealing act of 1828, it might be inferred therefrom that the Spanish, Roman and French laws were, and had been previously to the cession of Louisiana to the United States, indiscriminately and as distinct codes, the law of that province, and that each of these distinct systems of law had, *proprio vigore*, remained in force in this State up to the respective dates of the repealing statutes. If this were true, in point of fact, no reason can be perceived why the laws of France, like those of Spain, should not be judicially noticed without proof.

Now, it is, we think, a matter of historical notoriety, and a truth hardly susceptible of being controverted, that, when Louisiana was ceded to the United States, the only code of laws in force in that territory, as the prevailing system, were the colonial laws of Spain; and those laws continued in force after the cession, until their repeal in the manner before stated.

Can this be also said in regard to the laws of France? We think not; because it is also historically known, that after the delivery of Louisiana by France to Spain, in 1769, in virtue of the secret treaty of 1763, O'Reilly, Spanish governor and captain general of Louisiana, introduced into that province the Spanish code, in all its parts, and thereby repealed the French laws, which had previously prevailed therein.

It can hardly be supposed that O'Reilly acted without the royal sanction, as all his official acts seem to have met the king's approval.

In the report of the Council of the Indies to the king of Spain, in 1772, adverting to O'Reilly's second statement, wherein he considered it necessary that the province should be subject to the same laws as the other Spanish dominions in America, and that all proceedings should be carried on in the Spanish language, the council remarked: Your majesty approved these dispositions of O'Reilly, and the council considering this

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as an evidence of the advantages to be derived, admires the measures of the said general, which proves the vastness of his genius and that the establishment proposed by him is so far worthy of being made, that the necessary *cédulas* should be issued to the ministers of Havana and New Orleans, etc. See White's New Recopilacion, vol. 2. p. 462.

We learn from Martin's History of Louisiana, vol. 2, p. 14, that the laws of Spain became the sole guide of the tribunals in their decisions as early as 1769. And Judge Derbigny, the organ of the court in *Beard v. Poydras*, 4 Martin's Reports, p. 368, seems to entertain no doubt in relation to the abrogation by O'Reilly of the French laws.

That the French laws were so entirely rooted out, that no vestiges of their existence, especially of those which harmonized with the habits and feelings of the colonists, and the ancient customs of the colony, can be traced, is hardly to be supposed; the more particularly, as the laws of France and those of Spain had the same origin: that of the law of Rome. But, whatever French laws were retained, it was rather by the tolerance, than with the expressed acquiescence of the Spanish rulers; and what those retained laws were, is not generally known. How, then, can judicial knowledge of any such retained French laws be assumed by our courts?

True it is, that Louisiana was derived by the United States from France, and not from Spain, which had ceded it to the former in 1800; but in the interim, between the date of the treaty of St. Ildefonso, by which the colony was ceded to France, and its actual delivery by Spain, the latter country continued in the possession of, and retained actual dominion over the ceded territory, and no change was made in the laws thereof, which were the laws of Spain.

The possession of Louisiana, taken by Saussat for France, was only for an instant, and merely for the purpose of delivering it in accordance with the 9th Article of the Treaty of 1800 to the United States. The repealing, then, by our legislature of all the civil laws, indiscriminately, whether Spanish, Roman or French, which had existed in Louisiana previously to the transfer thereof to the United States, must be understood in the only sense which the legislature intended to attach to it.

So far as the laws of France were permissively auxiliary to those of the then prevailing Spanish law, and so far as the Roman law was adverted to, merely as the seminal and prolific source of the Spanish law, and as a means always used to expound the derivative law by its own unerring principles, it can be readily understood why the Spanish, Roman and French laws were all collectively abrogated in the sweeping clauses of the repealing statutes.

As we apprehend the rule, courts only take judicial knowledge of what ought to be generally known in its jurisdiction.

The laws of Spain were judicially noticed, because those laws were known generally to have been the prevailing code of laws in Louisiana, at the time of, previous to, and subsequently to the transfer thereof to the United States; and because those laws, as a system, having been operative in this State until their repeal, have become almost inseparably blended with our jurisprudence.

The laws of France must be proved, because, having been abrogated as

the prevailing general law of the province, many years prior to our acquisition of it, and never thereafter adopted as such, we do not possess, judicially, the means of knowing what French laws in particular were retained by Spain and handed down to us.

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We have been referred to the Articles of the Napoleon Code, but not proved; and, of course, we cannot notice them, as that Code was never in force in Louisiana, and, indeed, only became, as a Code, the law of France after Louisiana had become a territory of the United States.

In the absence of any proof of the laws of France, we have no other alternative than to decide the case arbitrarily, or to determine the rights and obligations of the contracting parties, and the effect and validity of the instrument sued on, by our own laws; which are presumed to be the same as those of France: the *locus contractus*. *Ripka v. Pope*, 5 A. 63. *Harris v. Alexander*, 9 Rob. 151.

The instrument declared on, it is strenuously contended by the defendants, is not legally binding on them, for the reasons and on the grounds set forth in their answers, and pressed in their arguments, which are very elaborate. The points made, and questions raised, are :

1. That, it being conceded by the plaintiff, that the amount claimed is a donation *inter vivos*, it is null and void as such, because it is not evidenced by notarial act, and because it is not accepted by the plaintiff with her husband's authorization.

2. That, as a donation, it contains a *fidei commissum* in favor of a trustee, and a substitution in favor of plaintiff's children, born and unborn, which are provisions or conditions contrary to, and reprobated by, the policy of the law.

3. That, supposing, for argument's sake, that the instrument being binding, the principal sum stipulated therein cannot be claimed, in whole or in part, until both Louis J. Pecquet and Marie, his wife, are dead.

4. That there is no solidarity in the pretended obligation, and that solidarity cannot be presumed.

5. Whether the condition has happened on which the contract became executory ?

6. From what date does interest run ?

We will proceed to examine these grounds and questions in the order in which they are presented :

1. If the advances made by Henry W. Moncure to his daughter, Catherine, are donations, are they, as donations, nullities for the reasons given ?

It is not questioned that the two several sums of thirteen thousand five hundred dollars have been actually received by Catherine Pecquet, and that they have both gone into the hands of her husband.

Were these sums abandoned by Moncure to his daughter by gratuitous title, as pure gifts, or were they loans of money made to her, for which she would be liable as a debtor to him, or to his succession ?

From all the circumstances and facts of the case, as set forth in the instrument, we have no hesitation in concluding that both amounts delivered to Catherine Pecquet were intended to be, and were, pure gifts, made to her by her father, in advance of her share of his succession, and that they would have been subject to collation, unless she renounced his

PECQUET succession ; in which event she might retain them. It was not a debt for
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 succession.

We view these advances as executed donations which needed no authentic act to prove them, nor any acceptance in express terms. See Art. 1528 C. C. And as was held by the court in *Chachéré v. Dumartrail*, 2 L. R. p. 41, they vested in the wife a legal title.

There is great similitude between the material facts of the case just cited and the one at bar, as appears by the subjoined statement or extract from the decision referred to :

"The donation," says the court, "seems to have been made in the following manner : Chachéré, the father, was the owner of certain tracts of land, of which he permitted the husband of his daughter to take possession and occupy for some time, who afterwards sold this property to one Johnson for \$1,600, which was paid (on Chachéré's ratification and confirmation of the sale) to his son-in-law."

From the whole tenor of the evidence, we do not doubt the intention of the father to give these tracts of land to his daughter, as a marriage portion ; but before any legal transfer could be made to that effect, her husband was permitted to make the sale as above stated.

The price, although paid to him by the vendee, must be considered as due to the owner of the property, Chachéré, the father, and was left in the possession of the receiver as a donation to his wife ; he received it as her agent, delivered from her father through the agency of the vendee of the land, who was really a purchaser from Chachéré, though nominally from Martel.

The donation was thus fully and completely effected. It was as fully executed as if the money had been delivered from the father to his daughter, and by the latter delivered to the husband.

If it was of movable or personal property and was executed, it was good according to law. C. Code 1528.

This is a case in point, and seems to us conclusive. Moncure intended to donate to his daughter in advance of her inheritance in his estate, and did so donate to Catherine, his daughter, the whole sum of twenty-seven thousand dollars, which went into her husband's hands ; and no better evidence of Nemours' consent to his wife's acceptance of the donation than that, if any such consent was needed, can be well conceived.

2. Does the donation to Catherine Pecquet contain a substitution and *fidei commissum*?

The District judge who tried the case did not view the advances made by Moncure in the light of donations or gifts ; and, therefore, deemed Article 1507 of the Civil Code inapplicable.

We concur with the learned judge in his opinion, that this Article of the Code has no application whatever to the subject matter of the present controversy ; not because it is not a donation, but simply because the dispositions of the donation do not fall within its provisions.

What disposition is there in the instrument that presents the appearance of, or the resemblance to, a substitution and *fidei commissum*?

No one is mentioned in the instrument in whom the legal title to the fund donated is vested for the benefit of another. Nor is there anything

therein which charges the donee to keep the thing *for* and to return it to another; and these are the tests of nullity prescribed by Article 1507 C. C.

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Marcadé, commenting on Article 896 of the Napoleon Code, vol. 3, p. 368, § 111, examines very carefully into the nature of a substitution, and terms it, "la clause par laquelle un donateur ou testateur impose à celui qu'il gratifie, la charge de conserver la chose donnée jusqu'à son décès, pour la transmettre alors à une ou plusieurs personnes que le disposant gratifie ainsi en second ordre. Ainsi, il faut, pour qu'il y ait substitution, que le bénéficiaire soit vraiment *obligé* par l'acte, 1o. de *conserver* la chose donnée, et 2o. de la conserver *jusqu'à sa mort*, 3o. pour la *rendre* à une personne désignée."

We look in vain in the instrument for these essential concomitants of a prohibited substitution; nor can we perceive in it any of those inconveniences or evils which have always been a reproach to substitutions.

Money was the thing donated, and it was contemplated that it should be used by the donee or her agent, so as to produce an annual revenue. The donee was not to preserve it; nor would she, even as a trustee, have been bound to keep each identical dollar, and to return that to her children or to her father's estate.

It was well said, in the case of *Groves v. McNutt*, 13 A. pp. 122-3, "If that is a *fidei commissum*, or a prohibited substitution, then the thing which the depositary receives and promises to preserve and return to the depositor, or the sum of money which my friend receives from me, and promises to return in one or ten years, are *fidei commissa* and substitutions.

See 5 Toul. No. 24; 3 Marcadé 460; Zacharie, part 2, book 2, section 694.

Marcadé, vol. 3, p. 368, § 460, treating of this subject says, "Il est clair que quand on reçoit une chose à charge d'en rendre une autre, il n'y a plus obligation de *conserver* la chose reçue.

Il suit de là qu'il ne peut pas y avoir substitution quand la libéralité a pour objet des choses fongibles, en sorte que le donataire ait la libre disposition de ces choses, et soit seulement chargé d'en rendre d'autres de même nature, qualité et quantité; dans ce cas, en effet, il n'y a pas obligation de conserver."

Let us examine the facts of the case:

Moncure advanced and delivered to Catherine, his daughter, unconditionally, thirteen thousand five hundred dollars, and subsequently advanced her, conditionally, a similar amount, and the whole amount passed into the hands of her husband; and this total fund was, by the very terms of the instrument, to be realized and made available for *her* use: so that the whole sum of twenty-seven thousand dollars advanced, should, through the instrumentality of an agent (improperly styled a trustee), to be selected by *herself*, be invested or placed at interest, upon the happening of one of two events, in order that she and her family, her children and her husband, might be assured in a becoming manner of the means of subsistence, should her husband become unable to provide them.

It will be observed that no designated trustee was named by Moncure himself; nor was the title to the fund *vested* in any one, to be named by his daughter, for the object and purposes expressed in the instrument.

In the case of *Franklin's Succession*, 7 A. 421, there was a trust estate,

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which presented an evident substitution ; whilst, in this, the ownership of the thing donated, was vested in the donee, Catherine Pecquet.

It was not the intention of Moncure that a trustee, or *fidei commissaire*, should be thrust forever between Mrs. Catherine Pecquet and her husband.

The appointment of a trustee by Catherine Pecquet was merely an advisory measure, which, at her option, she was free to regard or disregard. Any one so appointed by her would have been her agent, deriving his authority from her, and not from the mere force of the instrument.

See *W. B. Partee, &c. v. The Succession of H. R. W. Hill*, 12 A. p. 767.

Mrs. Catherine Pecquet, under the dispositions of the instrument, is capable of standing herself in court and asserting her legal rights, and she is the plaintiff in this suit.

3. Can the principal sum stipulated in the instrument be claimed in whole or in part, until both Louis J. Pecquet and Marie, his wife, are dead ?

By an express clause in the contract, it was understood and agreed that, so long as he or she, L. J. Pecquet and wife, live, they may be permitted to pay six per cent. interest on the said sum of twenty-seven thousand dollars, annually, for the purposes aforesaid, instead of paying the principal sum ; and, at the death of both of them, the said sum in money, or property in equivalent value, shall be paid or conveyed to the said Catherine's trustee, for the purpose aforesaid.

It is evident that the *term* given for the performance of the obligation, to wit : the payment of twenty-seven thousand dollars, or its equivalent, consisted of an event in the course of nature certain, to wit : the death of both Louis J. Pecquet and Marie, his wife. See Art. 2044 C. C.

The plaintiff, however, claimed from defendants, *in solido*, the whole amount, principal and interest, but in their answers, the defendants aver that, if they are legally bound at all, the plaintiff's claim must need be restricted to the stipulated interest.

"The complaint of the defendants," as was said by Judge Martin in the case of *Benedict v. Williams*, 4 Rob. 392, "is that the present suit places them prematurely in the situation in which the plaintiff might fairly have placed them thereafter ; in other words, that the suit is premature. This circumstance afforded them a *dilatory exception*, which might have been successfully urged in *limine litis*, but which cannot avail them after a judgment by default."

We can see no difference in principle between that case and the present one, on the question of practice now involved.

The defendants, in the case referred to, resisted the plaintiff's claim, on the allegation in their *answer* that the right of action thereon had not yet accrued, of which fact, proof was adduced on the trial, and this is the defence in that point, set up in the *answer*, and patent in this case.

It was considered by Judge Martin a *dilatory exception*, in the case of *Benedict v. Williams*, to be only urged in *limine litis*, and we deem that ruling as conclusive in this case. See *Noble v. Martin*, 7 N. S. 284 ; *Howard v. Steamboat Columbia*, 1 La. 420 ; and also the act of 20th March, 1839, amending the Code of Practice ; which provides, that hereafter no *dilatory exception* shall be allowed in an answer in any cause. If, in

some cases the application of this law seems to operate perniciously, it is still a rule of practice and cannot be disregarded. *Dura lex scripta* PECQUET
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tamen.

4. Is the obligation contracted by Louis J. Pecquet and Marie, his wife, a joint one, or one *in solido*?

The judge *a quo* who tried the case, considered the obligation a joint one. By Article 2088 C. C., solidarity is not presumed, it must be expressly stipulated; and this rule ceases to prevail only in cases where an obligation *in solido* takes place by virtue of some provision of law, "*ou la solidarité a lieu de plein droit en vertu d'une disposition de la loi*." We must, therefore, first ascertain what is the nature of the obligation contracted by Louis J. Pecquet and Marie, his wife. The instrument sued on is executed by them alone, and purports on its face to be an acceptance, on their part, of a proposition or offer made to them by Henry W. Moncure to pay and advance to his daughter Catherine, an additional sum of thirteen thousand five hundred dollars, to go into her husband, their son's hands; provided they would obligate themselves, in the manner in which they did obligate themselves, in the instrument, in which there was a stipulation in favor of Catherine and for the benefit of her children. This stipulation was a valid consideration for the contract; and as Catherine, by instituting this suit, has consented to avail herself of it, it cannot be revoked. See Articles 1884, 1896 C. C.; Article 35 C. P.; *Watt v. Rue*, 1 An. 280; *Twitchell v. Andry and Wife*, 6 Rob. 410; *Andrews v. Williams*, 4 La. 238.

Was the obligation of L. J. Pecquet and wife a principal obligation, or an accessory one—one of suretyship?

The act or instrument has all the features of a suretyship, and satisfies the essential conditions of that species of contract, in which three persons must figure, viz: a debtor, a creditor and a surety. The principal obligor is Nemours Pecquet, who is accountable for his wife's paraphernal property, which she can legally claim from him by suit, whenever her claim is exigible. Arts. 2360, 2361, 2364, 2368 C. C.; 8 Martin's N. S. 229; *Hawes v. Bryan*, 10 La. 136; *Rowley v. Rowley*, 19 La. 572. The creditor is Catherine, the wife of Nemours; and the sureties are the defendants in this suit.

Art. 3004 defines a suretyship an accessory promise, by which a person binds himself for a person *already bound*. It was not important that the principal obligation should have preceded the accessory promise. "Non seulement, says Duranton, le cautionnement peut suivre ou accompagner l'obligation principale, mais il peut même être donné avant cette obligation, en ce sens toutefois qu'il est conditionnel qu'il existera si l'obligation elle-même vient à exister." *Fidi jussor et præcedere obligationem et sequi*. § 3 Instit., de *Eidi jussoribus*.

The obligation assumed by Louis J. Pecquet and wife was that, in the event of their son's failure in business, and his inability to refund to his wife the whole sum of twenty-seven thousand dollars, her paraphernal property, thus received by him, they became sureties for its reimbursement.

Had they not assumed this liability, Moncure would certainly not have advanced the second sum of thirteen thousand five hundred dollars.

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It was natural, just and reasonable, that the father and mother of Nemours Pecquet should obligate themselves thus for their son. It was laid down as a rule by the Christian Emperors, that no security could be taken in behalf of a husband for the restitution of his wife's separate estate, unless the father and the mother of the husband contracted such an obligation. Domat, book 4, tit. 9, § 9. And certainly, under our law, such a contract is a valid one, and no legal impediment stands in the way of Mrs. Marie Pecquet to enter into it. See Arts. 1775, 1779, 124 C. C.; *Roberts v. Wilkinson*, 5 Al. 369; *Terrell v. Yoe*, 2 A. 903; *Moussier v. Zuns*, 14 A. 18. And no proceeding was necessary in advance or simultaneously with this one against the principal debtor, before a resort against the sureties. *Boutté, f. m. c., v. Martin et al.*, 14 La. 135.

This disposes of the exception to the action filed by the defendants.

The nature of the obligation contracted by Louis J. Pecquet and Marie, his wife, being ascertained, is it one "où la solidarité a lieu de plein droit en vertu d'une disposition de la loi?" On the authority of Duranton, liv. 3, tit. 14, § 341, du Cautionnement, "Lorsque plusieurs personnes se sont rendus cautions d'un même débiteur, pour une même dette, elles sont obligées chacune à toute la dette; parceque chacune d'elles l'a effectivement cautionné en entier, en ne restreignant point son cautionnement sur le pied d'une part seulement, sauf ce qui va être dit sur le bénéfice de divisions."

The case of *McCausland v. Lyons*, 4 A. 274, is in point and meets our full concurrence.

The court says: "Under the provisions of our law the contract of suretyship is of a mixed character.

The obligation of the surety is to pay the whole debt; but this solidarity is tempered by the right of division. The right, however, vests in *facultate*.

The surety has the right to demand the division; but until the right is exercised, the obligation is solidary."

In the case cited, as in the one now pending, there has been no demand of division by the sureties. They were attacked by the plaintiffs as debtors *in solido*, and pleaded the general issue.

The exception is a peremptory one, which must be pleaded specially; and this has not been done in the court below, nor even in this court."

Dividitur obligatio inter plures fidejussores per exceptionem duntaxat, non ipso jure. It is not an exception that can be supplied by the court. See Troplong, Cautionnement, § 297, and the authorities there cited; Merlin, Répertoire, verbo Caution, § 4, No. 2.

5. Has the condition happened to fix the liability of Louis Joseph Pecquet and Marie, his wife?

The judge *a quo* thought that there was sufficient evidence in the record to show that one of the events, to wit: the failure of Nemours Pecquet, had occurred, and that the obligation assumed by Louis J. Pecquet and wife had thereby become absolute. In this view we concur; and we consider them legally bound *in solido* for the whole amount claimed, principal and interest.

6. And this brings us to the last question: From what period must in-

terest be computed? From the date of the failure of Nemours Pecquet, or from judicial demand?

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This question is not free from difficulty; but we have no hesitation, after due reflection, in restricting the claim for interest, so as to compute it only from judicial demand. The principal sum, it is true, was due by the defendants at the time of the failure of Nemours Pecquet, and they could only retain it by paying the annual stipulated interest; but, so long as Nemours retained possession of the fund, which was the *paraphernal* property of his wife, the fruits, or the interest thereof, belonged to the community of acquêts, still existing between them. See Art. 2363, C. C. *Rowley v. Rowley*, 19 La. 580.

Had the plaintiff, instead of suing her husband's sureties, brought suit directly against him, it is very evident she could not have recovered interest except from judicial demand, and perhaps from the date of the rendition of judgment; and, as the suretyship cannot exceed what may be due by the debtor, nor be contracted under more onerous conditions, it must, in either contingency, be restricted or reduced to the conditions of the principal obligation. See Art. 3006 La. Code.

By paying the claim of Mrs. Catherine Pecquet, L. Joseph Pecquet and wife become legally subrogated to her rights, and to nothing more. 2157 § 3 C. C.

Upon a careful examination of the whole case, we think that the law and the evidence are in favor of the plaintiff, and entitle her to the judgment which will now be rendered.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed, and proceeding to give such judgment as should have been rendered by the said court:

It is ordered, adjudged and decreed, that judgment be and it is hereby rendered in favor of the plaintiff, Mrs. Catherine Ambler Moncure, wife of Nemours Pecquet, and against the defendants, *in solido*, to wit: the succession of Louis Joseph Pecquet, opened in the Second District Court of New Orleans, and Mrs. Marie Collette Ducongé, widow of the said Louis Joseph Pecquet, in the sum of twenty-seven thousand dollars, with legal interest, five per cent. per annum, from judicial demand, the 7th June, 1859, till paid, and the costs of suit in both courts, the judgment now rendered against the succession of Louis Joseph Pecquet to be paid in due course of administration.

P. CAZELAR, Jr., v. A. W. WALKER.

Where a damaged article has been received and used by the contractor, knowingly, he cannot repudiate his contract, much less claim damages arising from injury sustained by its use.

A PPEAL from the District Court of Parish of Plaquemine, *Foulhouze, J. D. Augustin* and *A. Charvet* for plaintiff. *A. Sambola* and *P. A. Ducros* for defendant and appellant.

HOWELL, J. Plaintiff, in this action, claims \$600, as the price of two hundred cords of wood at \$3 per cord, sold and delivered to defendant, who admits the sale, but alleges that the full quantity was not delivered; and that, in violation of an express stipulation of the contract, the plaintiff sent him seventy-five cords of overflowed and damaged wood, which, in using it, caused delay in the process of sugar-making, and a depreciation in the quality of the sugar made with it, for which he claims damages, in reconvention, to the amount of \$690.

Judgment was rendered in favor of plaintiff for \$514 28, with interest, and dismissing the reconventional demand.

Defendant appealed.

We concur in the opinion of the District judge that, under the circumstances, the defendant is not entitled to any damages that may have resulted from using the overflowed wood. He knew its condition and was not bound to use it. And, although our calculation, as to the deficiency in the quantity actually delivered and the deduction in the total price, differs, by a few dollars, from that of the lower court, we think substantial justice has been done between the parties, and we see no cause for disturbing the judgment.

It is therefore ordered that the judgment be affirmed, with costs.

P. R. FELL v. J. C. DARDEN & Co—H. H. HICKS & Co., Intervenor.

A sale which is valid by the laws of the country where it is made, is valid everywhere. The *lex loci contractus* must govern.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J. Davidson* for plaintiff. *Durant & Hornor* for Intervenor.

HYMAN, C. J. H. Darden, transacting business in the State of Tennessee, under the name of H. Darden & Co., sold his stock of goods by act of sale, passed in that State, to H. H. Hicks & Co. Vendor and vendees resided there.

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At the time, a part of the goods thus sold was *in transitu*, shipped from Liverpool to New Orleans.

Immediately after the goods arrived in New Orleans, and before the agent of the vendees could get possession, plaintiff, a resident of this State, as a creditor of Darden, had them attached.

The vendees then intervened, and claimed them as owners, by virtue of the sale aforesaid.

The court gave judgment in vendee's favor, and dismissed the suit as to defendant.

Plaintiff appealed.

By the laws of Tennessee, as proven, a sale without delivery of property sold, is valid against vendor's creditors; and the question is, whether the property sold while *in transitu* can be attached by Darden's creditors, when brought here?

Had the goods been in this State, at the time of the sale, an attachment of them would have been sustained: there being no delivery, and, until delivery, creditors have a right to seize and attach property sold by their debtor. See Art. 1917 Civil Code. The court would then have protected the citizen in his claims, as no nation is bound by comity to recognize or enforce, to the injury of its citizens or in violation of its positive legislation, contracts on property situated within its jurisdiction; but the goods not being within this State at the time of sale, our laws had no control over them, and their subsequent removal here cannot change acquired rights.

The contract was complete by the laws of Tennessee, and the general principle is that a sale which is valid by the laws of the country where it is made, is valid everywhere.

The *lex loci contractus* must govern this case, as it presents no exception to this general principle. See Civil Code, 10; Code Prac. 13; 7 Mar. R. pp. 213 and 355; 8 Rob. R. p. 262.

No citation was served on defendant, an absentee. No property is shown, belonging to him in this State, on which a judgment can operate. No suit is pending where the absentee might, from necessity, be made a party in furtherance of justice. The appointment of an attorney *ad hoc* for defendant, and service on the attorney thus appointed, is insufficient to bring the defendant into court. See 2 An. R. pp. 562 and 1010.

Judgment affirmed.

HOWELL, J., recused.

JOHN MORGAN HALL v. E. W. BEGGS—W. W. HANDLIN, Warrantor.

No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered.

A second appeal may be granted when the first has been dismissed without a decision on its merits. Where an appeal was taken in the court *a quo*, the fact that no appellate court existed would not interrupt the prescription. It might be otherwise if there had been no judge in the lower court to grant an appeal.

A PPEAL from the Fifth District Court of New Orleans, *Theard, J.*
Robert Mott for plaintiff and appellant. C. Roselius and W. W. Handlin for defendant.

HOWELL, J. A motion is made to dismiss the appeal in this case, on the ground that more than one year had elapsed from the signing of the judgment, before the order of appeal was granted, said judgment having been signed on the 24th January, 1863, and said appeal granted September 7th, 1865.

A former appeal was taken on 1st June, 1863; and on the 6th June, 1865, upon a motion to dismiss, this court rendered a judgment dismissing the appeal, on the ground that the record did not contain all the evidence adduced on the trial in the lower court, an omission attributable to appellant; which decree was, on the 25th of the same month, duly recorded in the District court.

Plaintiff, after obtaining an order, on 7th September following, for a second appeal, instituted proceedings contradictorily with the appellee to perfect the record, and he now contends that the first appeal was erroneously dismissed, because it was shown in those proceedings that the defect in the transcript of appeal arose from the act of the appellee, and not the appellant; and that the prescription of one year, established by Art. 593, C. P. did not begin to run until the date of filing the record in the first appeal in 1865, because there was no Supreme Court.

It is clear that we cannot now revise the judgment of this court dismissing the first appeal, as it has become final. The appellant failed to avail himself, at the proper time, of the remedies which the law afforded him, and he cannot get the benefit of them in this proceeding.

As to his second position, the Code of Practice provides that "no appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered," and we can see no reason for exempting this case from the operation of this law. A second appeal may be granted, when the first has been dismissed without a decision on the merits, provided it is claimed within the year after the judgment became final in the lower court. 11 L. 380.

The rule "*contra non valentem agere nulla currit prescriptio*" does not apply in this case, as plaintiff *did act*, in taking his appeal to the Supreme Court, within the legal delay, and citing the appellee to appear here and answer to said appeal; and the fact that there were no judges of the Supreme Court under commission to hold court, or clerk to file the record, does not interrupt the prescription in question. The appellant had al-

ready exercised his right of appeal. In the case of *Griffing v. Bowmar*, 3 R. 115, the court say: "We know of no law that recognizes an interruption of the prescription of one year against an appeal; nor do we think the general doctrines in relation to the interruption of prescription apply to such a case." We do not wish to be understood, however, as holding that prescription would not be interrupted, had there been no judge in the lower court to grant an appeal.

The motion must prevail.

It is therefore ordered and decreed, that the appeal herein be dismissed at appellant's costs.

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BROOK.

JOHN C. SMITH v. J. L. THIELEN, Executor of LUCY A. CALDWELL,
Deceased.

The measure of damages is the amount of loss the plaintiff has sustained, and the profit of which he has been deprived, with the qualifications stated in Article 1928 C. C.
To recover damages plaintiff must make his claim certain; to make it only probable is not enough.
But, when this is not done, the judgment below should not be final, but one of non-suit.

A PPEAL from the Second District Court of New Orleans, *Morgan, J.*
Budd & Lambert for plaintiff and appellant. *Alfred Hennen* for defendant.

HOWELL, J. The plaintiff having leased from the deceased, for a term of years, the establishment known as the United States Hotel, in the Third District of this city, brought suit against her succession for damages to the amount of one thousand dollars, for an alleged violation of the following clause in the act of lease between the parties, to wit: "And the lessor binds herself, her heirs and assigns, not to rent out the house on the corner of Victory and Elysian Fields streets, adjoining said United States Hotel, for the purpose of having therein any hotel, or any similar business, nor to keep therein any such business for herself."

It is alleged in the petition, and established by the evidence that plaintiff, as well as those who preceded him, carried on in the leased premises, the business of keeping boarders and lodgers, a bar room and billiard tables; and that some time after he had taken possession, a billiard saloon was opened in the upper part of said corner house, and a bar-room opened, and a few boarders kept in a building on Victory street, in the rear of and adjoining this corner house, and which was once the kitchen to said house.

A general denial was pleaded, and the judge of the District court rendered judgment in favor of defendant, for the reason that there was no such evidence of damages as to justify a judgment in favor of plaintiff, and expressed a doubt as to whether or not there was a violation of the contract.

Construed with reference to the allegations and proof, it is fair and legitimate to hold that the expression, "any hotel or any similar busi-

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ness," used in the restrictive clause, referred to the business, which was to be and had been conducted in the United States Hotel, which was the keeping of boarders, a bar room and billiard tables; and that it was the intention of the parties that no such business, or any branch thereof, should be carried on, during the continuance of the lease, in the adjoining house, in competition with plaintiff, in whose favor the stipulation was made. In this sense, there was evidently a breach of this covenant by the deceased.

We agree, however, with the judge *a quo*, that the evidence does not enable the court to fix accurately the damages resulting from this violation of the contract.

The measure of damages is the amount of loss the plaintiff has sustained and the profit of which he has been deprived, with the qualifications stated in the Code. C. C. 1928; 9 An. 294.

The statements of the witnesses, that the daily receipts of plaintiff fell off, or decreased a *certain named amount*, after similar business was opened by the deceased in the adjoining buildings, because the customers who frequented plaintiff's house resorted to the other, do not meet this standard. They do not show the profit which plaintiff would have made out of those customers who left him. Their aggregate of the decrease or falling off in the receipts is not shown to be exclusive of the expense of conducting the business, the costs of materials, etc. These are left to arbitrary calculation or assumption.

In addition to these considerations, the difficulty of showing that plaintiff would have received the benefit of the patronage of these customers, had the adjoining establishments not been opened, contrary to the contract (which has not been attempted), inclines us the more readily to strictly apply the rule that, "to recover, one must make his claim certain; to make it only probable is not enough." The plaintiff has not established, with legal certainty, the amount of damages actually sustained by him. We cannot assume that the whole or any given part of the amounts named by the witnesses, as the diminution of receipts, is the amount of the loss he has sustained and the profit of which he has been deprived.

But we think the lower court erred in giving final judgment against the plaintiff: it should have been one of nonsuit.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be avoided and reversed; and it is now ordered and decreed, that there be judgment against the plaintiff as in case of nonsuit, and that he pay the costs of the lower court, and the defendant pay the costs of this appeal.

WOODLIEF & LEGENDRE *v.* H. W. MONCURE.

No man ought to be held responsible for the acts of another done to his prejudice and against his will. Thus it is held in regard to the *negotiorum gestor*, that the latter must have intended to act in the interest of, and to manage the affairs of another, and not his own; and the management must have been useful at the time.

A PPEAL from the Third District Court of New Orleans, *Duvigneaud, J. Kennedy & Miles* for plaintiffs and appellants.

Durant & Hornor for defendants.—As to plaintiffs being *negotiorum gestores*, the law is plainly against them. Defendant had no need of a *negotiorum gestor*; he was here in town, and had the matter been communicated to him, which there was nothing to prevent, he could have attended to it himself. See Dig. b. 3, tit. 5. *Hoc edictum necessarium*, etc. Inst. b. 3, tit. 28: *Igitur cum quis*, etc.

The payment by plaintiffs was of no advantage or profit to defendant. See 5 Marcadé, p. 252. *Pour que le maitre soit obligé*, etc.

The payment was made entirely for plaintiff's benefit. See Dig. b. 3, tit. 5, sec. 6, § 3. *Sed si quis negotia mea*, etc.

The payment was made against the will of Moncure, who always declared he would never pay it; it was in violation of the maxim, *inviti aut contradicentis negotia non geruntur*. See Mackeldey, sec. 459; *Tucker v. Carlin*, 14 An. 734.

LABAUVE, J. This suit is brought to recover of the defendant the sum of \$534 50. The plaintiffs say that Hopkins had sold said Moncure sugar and molasses, deliverable on the plantation on Bayou Black; that said Moncure had received said sugar and molasses, and paid on account \$14,992 80, leaving a balance due said Hopkins of \$534 50; and that they paid said balance to said Hopkins as the *negotiorum gestores* of said Moncure, taking, at the same time, a transfer.

The defendant answered by a general denial; and, in substance, denied that said plaintiffs acted as *negotiorum gestores* of defendant, and that, on the contrary, they had acted in their own interest, and for themselves, in effecting, as brokers, a sale of Wyndham Robertson's plantation and crop to Alfred Hopkins; that, in order to close the said sale and realize their commission as brokers, petitioners advanced the sum now claimed, etc.

The judge below, after hearing the testimony, gave judgment in favor of defendant, and plaintiffs appealed.

The testimony shows that the defendant had agreed to buy the crop at city prices; that the sugar and molasses amounted to \$15,527 38, and that the estimated freight from the plantation to New Orleans was \$534 50; that the defendant paid \$14,992 80, and refused to pay the balance of \$534 50, on the ground that he took the sugar and molasses on the plan-

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tation, and the probable freight must be deducted. The plaintiffs were not the brokers in selling the crop, but they were so in the selling of the plantation for \$180,000. The commission was two per cent. on the whole amount, and they received \$3,600 for brokerage. The cash payment on the plantation was \$50,000, to be made up in a certain way; and it required this disputed balance of \$534 50 to complete the cash; and it is in evidence that, if this disputed balance had not been paid, there would have been no sale. The plaintiffs paid the disputed balance to make up the deficit, and said they intended to sue the defendant for it.

The plaintiffs predicate their demand on two grounds: 1. They acted as *negotiorum gestores* for defendant in paying said balance. 2. That they took, at the same time, a subrogation from Hopkins to all his rights against said Moncure.

There is no evidence in the record showing the alleged subrogation.

The question, whether the plaintiffs acted, as alleged, as *negotiorum gestores* or not, depends on facts. Did the plaintiffs act as friends, and for the interest and advantage of the defendant, in taking upon themselves to pay this disputed balance? If the answer be in the affirmative, they must recover; and, if it be in the negative, there must be judgment for the defendants. It requires no argument to demonstrate that they acted for themselves, for their own advantage and interest, well knowing that the defendant objected to pay said balance, and giving his reasons for his refusal. When they paid this balance, they said they would sue the defendant for it. The defendant had no interest in the change of creditors. The plaintiffs, as it seems, paid this balance to conclude a sale, and to receive a commission of \$3,600. For these reasons, and those given by our learned brother below, the judgment must be affirmed. 14 A. 734.

It is therefore ordered and decreed, that the judgment appealed from be affirmed, with costs.

THOMAS J. EARHART v. NEW ORLEANS AND CARROLLTON RAIL ROAD
COMPANY. *

The act of 18th March, 1855, for a suit in damages, under Art. 2294, is a legal subrogation in favor of the persons there designated, to the right of action of the deceased sufferer, and the plaintiff must allege his cause of action as derived from the deceased.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor for plaintiff.—This is an action for damages, brought by the father of a child killed at the Carrollton railroad depot, on the 31st of January, 1860, from being knocked down by a locomotive engine and run over. Both legs of the boy were crushed, and amputation ineffectually resorted to to save his life.

The defendant first [filed an exception, that the petition set forth no cause of action; and, in case this was overruled, a general denial.]

There can be no doubt of the correctness of the judgment of the lower court on the exception. See act of 15th March, 1855, pp. 270 and 271.

The case was tried before a jury, who gave a verdict for one thousand dollars; and defendant has appealed.

We will first call attention to the bills of exception in the record.

The plaintiff's counsel offered to prove by a witness, *Thomas Gleary*, who had charge of the engine when the event occurred, that he, the said *Gleary*, while in the defendants' employ, had run over other persons and inflicted other injuries. This testimony the court rejected; and in so ruling the court erred, for the testimony was admissible to show the character of the witness, that he was a reckless and unskillful man, and that, knowing him to be such, the defendants kept in their employ.

The next bill of exceptions is on page 45. The plaintiff put upon the stand the brother of the deceased boy, and his own son, who being objected to by defendants, was rejected as a witness by the court. In this the court erred. The suit is not really that of the father, but of the deceased child. The statutes says, act of 1855, p. 270: "The right of this action shall survive." What action? That which the injured party had. The right of action not being in the parent, those who are deemed incompetent by reason of their relation to the latter, in his own case, cannot be deemed incompetent in this. The tendency is to admit, not to exclude witnesses; and this is sustained by reason. Suppose the action commenced during the lifetime of the child, the brother would then be a competent witness. Suppose the child to die while the trial was going on, before or after the brother was sworn, how could the death render him incompetent? The witness was not offered "with respect to his father," as prohibited by L. C. Article 2260, but with respect to his deceased brother.

C. Roselius for defendant and appellant.—No action can be maintained by the father for the death of his minor child, unless he sets forth and claims specific actual damages. The present is simply an action sounding in damages for an alleged tort. He avers that by reason of this

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heavy calamity, he, himself, his wife, the mother of the said Osborne, and the whole of petitioner's family, were and remain plunged in the deepest grief and affliction, and your petitioner has suffered damages from the illegal and wrongful conduct of the company, as above set forth, to the extent of twenty-five thousand dollars.

It seems clear to me that the plaintiff's action thus brought for damages sustained by himself can derive no support from the act of the 15th March, 1855 (see Revised Statutes, p. 271), for that law merely provides that, "in case of the party in whose favor the right to claim damages for a tort has arisen should die before exercising it, the action for enforcing it shall survive in favor of the minor children and widow of the deceased, or either of them; and in default of these, in favor of the surviving father or mother, or either of them, for the space of one year from the death."

There is no obscurity nor ambiguity in this language. It has a clear, obvious meaning, and that is, that the surviving relatives, here spoken of, may bring an action for the recovery of the damages suffered by the deceased by reason of the tort committed by the defendant. If there existed any right of action resulting from facts alleged, it clearly belonged to the sufferer, and not to his father, except by transmission at his death, under the statute above referred to, amendatory of the 2294th Article of the Code. It is therefore respectfully submitted that the exception to the petition should have been sustained, and the suit dismissed.

But even if the action in its present form can be maintained, it is confidently submitted that under the evidence in the record, the verdict should be set aside and the judgment reversed. There cannot be any doubt that the unfortunate young boy met with this sad misfortune through his own imprudence. Every care and precaution was taken by the servants of the defendants to avoid this accident. Under such a state of facts, he could not recover any damages if he were living, nor can his father recover any after his death. 17 L. R. p. 361; 18 L. R. p. 339; 6 A. R. p. 496; 9 A. R. p. 441; 11 A. R. p. 292; 1 A. R. p. 374; 3 A. R. p. 48; 3 A. R. p. 441.

LABAUVE, J. The plaintiff alleges, in substance, that the New Orleans and Carrollton Railroad Company is legally indebted unto him in the sum of \$25,000; that, on the 31st January, 1860, petitioner's son, Osborne C. Earhart, was thrown down and run over by a locomotive steam engine, driven on the track of said company by persons in its employ; that petitioner's son was between ten and eleven years old, and standing then and there quietly, looking at the cars and train, when, suddenly and without giving any warning, one of the locomotives and trains backed and struck the said Osborne, who was standing with his back to the said locomotive and train, crushing both his legs, which were amputated in the hope of saving his life, but that the operation was ineffectual; and soon after, on the 5th day of February, after having endured the most intense suffering, the said Osborne died; that the servants of said company, then in charge of said locomotive and train, managed them in a careless and unskillful manner, and that, by reason of this carelessness of said servants, his son Osborne suffered a cruel and painful death.

Your petitioner further shows that, by reason of this heavy calamity,

he himself, his wife, the mother of the said Osborne, and the whole of petitioner's family were and remain plunged in the deepest grief and affliction; and your petitioner has suffered damages from the illegal and wrongful conduct of the company, above set forth, to the extent of \$25,000.

He prayed accordingly.

The defendant filed the following exception :

The defendant herein, the New Orleans and Carrollton Railroad Company, excepts to plaintiff's petition, and for cause of exception represents to this honorable court that said petition sets forth no lawful or valid cause of action; prays that said exception be sustained and plaintiff's demand rejected.

The District judge overruled the exception; verdict and judgment having been rendered on the merits, in favor of plaintiff, the defendant took this appeal.

Before the passage of the act of 15th March, 1855, amending Art. 2294 of C. C., it was considered as settled that actions like the one at bar were purely personal, and not transmissible with the succession of the party sufferer, but died with him. The Supreme Court had said that it required a special statute to give this right of action to other parties. 6 A. 495. 11 A. 5. It is, in consequence of this, it is supposed, that the act above referred to was passed, reading as follows :

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in cases of death, in favor of the minor children and widow of the deceased, or either of them, and, in default of them, in favor of the surviving father or mother, or either of them, for the space of one year from the death."

The plaintiff, to bring his case within the provisions of the statute, should have alleged the cause of action in, and the damages suffered by, his deceased child, and survived under the statute, in himself, plaintiff. But, on the contrary, he alleges the cause of action in himself as the sufferer of damages, to wit: "He avers that, by reason of this heavy calamity, he himself, his wife, the mother of said Osborne, and the whole of petitioner's family, were and remain plunged in the deepest grief and affliction, and your petitioner has suffered damages from the illegal and wrongful conduct of the company, as above set forth, to the extent of \$25,000."

In the words of the statute, it is a legal subrogation in favor of the persons designated, to the right of action of the deceased sufferer; and, in case of a suit under that subrogation, the plaintiff should allege his cause of action as derived from the deceased, under the statute.

It is therefore ordered and decreed, that the judgment of the District court be annulled and avoided; it is further ordered and decreed, that the exception be sustained and the petition dismissed, as in a case of non-suit; the plaintiff and appellee to pay costs in both courts.

HOWELL, J., recused.

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LAURENT MILLAUDON *v.* ALEXANDER LESSEPS.

In general, all personal actions, except those expressly enumerated, are prescribed by ten years, if the creditor be present, and twenty years, if he be absent.

The claim of an agent against his principal for services is not embraced in the words "open accounts," which, by the statute of 1852, are prescribed against in three years. Ten years is the only prescription against such a demand.

The plea in compensation has a retroactive effect from the time when the plaintiff and defendant became indebted to each other. Hence, the plea of prescription must be overruled where the debts existed simultaneously.

The mandatory, or attorney, is answerable for the interest of any sum of money he has employed to his own use, for the time he has so employed it; and for that of any sum remaining in his hands, from the day he become a defaulter by delaying to pay it over.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
John Finney and C. Dufour for plaintiff.—We have before remarked that there is no evidence to show that the plaintiff was bound to account for the proceeds of the note in question. But even if he were, his obligation was not that of a depository. The relation between him and the defendant was simply that of debtor and creditor. *New Orleans & Carrollton Railroad Company v. T. B. Harper*, 11 A. R. 212; *Mattheus, Finley & Co. v. Their Creditors*, 10 A. R. 342; *Sims v. Blean*, 10 An. 346.

Nor can the plea of prescription be defeated by the rule "*quæ temporalia sunt ad agendum sunt perpetua ad excipiendum.*" That rule only applies where the claims sought to be compensated are connected together and grow out of the same affair. *Boeto v. Laine*, 3 An. 141; *Girod v. His Creditors*, 2 An. 546; *Troplong, de la Prescription*, No. 833.

The judgment of the court below was for the amount demanded by the plaintiff in his petition. We respectfully refer to the judgment and opinion of the lower court.

We respectfully pray for an affirmance of the judgment and costs.

There is a paper pasted on the first page of the transcript, which, your honors will perceive, forms no part of it. This paper bears no date, but was filed in this court on the 13th of November, 1861, the day after the transcript was filed. And the certificate of the clerk, bearing date the 29th of October, 1861, certifies that the transcript contains a full and complete transcript of all the proceedings had, documents filed, and testimony adduced, on the trial of the cause. No statement of facts was therefore admissible, and if so, it was not made in the manner, nor within the time required by law. C. P. 602, 603; 8 N. S. 305; 3 L. R. 455; 16 L. R. 137; 10 An. 554.

L. Castera and P. H. Morgan for defendant.—This plea of prescription is untenable. L. Millaudon was either a depository or an agent. If depository, the law does not allow him to set up the plea of prescription. If an agent, he is in no better condition.

The Civil Code, Art. 3476, says: "Those who possess for others, and not in their own name, cannot prescribe, whatever may be the time of their possession; thus, former tenants, depositaries, usufructuaries, and

all those generally who hold by a precarious tenure in the name of the proprietor, cannot prescribe on the thing thus held."

Commenting upon Art. 2236 of the Napoleon Code, which corresponds to the above quoted article of the Louisiana Code, Troplong says:

"Le mandataire a une possession précaire, puisqu'il reconnaît un maître à qui il doit rendre compte.

"Mais une possession *animo domini* courra-t-elle pour lui à compter de la cessation légale du mandat, ou bien à compter de la reddition de compte?

"Je pense que pour que le vice de précarité soit purgé, le mandataire doit présenter une décharge de son mandant. Alors seulement il y a intervention par le fait d'un tiers, conformément à l'article 2238 (Louisiana Code en 3478), sans quoi la possession continue à rester une possession pour autrui.

"S'il n'y avait pas eu une reddition de compte, on se déciderait par les principes exposés au numéro précédent. Trente années écoulées depuis la cessation légale du mandat feraient supposer que le compte a été rendu à le moment, et que le mandant s'en est contenté; on en conclurait donc que la possession bonne pour précaire, après son point initial, parcequ'il y a eu interversion réelle ou présumée par le fait de celui qui y était intervené. Troplong, Prescription, p. 490.

Thus, as your honors perceive, a mandatory who, under our laws as well as those of France, has a precarious possession of what belongs to his principal, can only plead prescription in two cases, viz:

1. When he can show a discharge from his principal.

2. When thirty years in France and ten years in Louisiana have elapsed since the *cessation légale* of the mandate, and no account has been rendered; and in this latter case, prescription is based upon a supposed interversion, originating from the silence and inaction of the interested party (that is the principal) during the time fixed by law; which necessarily implies that the principal was aware of the cessation of the mandate.

Your honors' predecessors have adopted these views of Troplong, and even have gone further in the much litigated case of *McDonogh v. DeLassus et al.*, 10 R. R.; they say, on page 487:

"It seems to us that the law does not, by the contract of agency, establish at once the relation of debtor and creditor, between the agent and principal. That the former may easily become a debtor and the latter a creditor is undeniable; but not, we suppose, until the dissolution of the contract, and the neglect or refusal of the agent to account and pay over the funds and property in his hands."

And on page 488: "We are not prepared to establish, as a general rule, that the relation of principal and agent is that of creditor and debtor; as soon as the latter receives money or property for the former, we regard it as something more. It is a trust, and the receipt of money or property does not give the agent a title to it, which would be the case if he be regarded as a debtor alone."

Now, if the mandatory does not become the debtor of his principal upon receiving money or property belonging to the latter; if he is a mere trustee and acquires no title to the money or property thus received by

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him, the inevitable consequence is that his possession continues to be precarious, and he cannot set up the plea of prescription, whatever may be the time of that possession.

But it may be objected that the prescription, nevertheless, runs according to Troplong, from the *cessation legale* of the mandate ; and, according to the Supreme Court, from the dissolution of the contract ; and that, in this particular case, the *cessation legale* or dissolution of the contract had taken place more than ten years before our plea of compensation was set up. There might be some force in the objection, if the mandate in this case had had, either by the will of the law or the agreement of the parties, a fixed period of duration ; for then, it might very properly be contended, that the principal knew or was bound to know the precise time when the contract was dissolved, or had legally ceased to exist. But, in this case, the mandate had, neither in law nor by the will of the parties, any determinate period of duration ; until the note was collected, the agency was in force. It only ceased to exist when the money was received by L. Millaudon. In other words, the mandate ceased to exist upon the happening of a fact, that of payment, which Millaudon was necessarily aware of, which it was his duty to bring home to our knowledge, but which he concealed from, or, at least, failed to communicate to us.

LABAUE, J. This suit is based upon the following written promise of the defendant :

“Je m'engage par ce présent écrit à régler la réclamation de Mr. Laurent Millaudon, montant à la somme de \$3,996 50, à la date du 7 Décembre, 1852, pour la réclamation du syndicat provisoire, en billets endossés par mon fils Auguste, lesquels billets seront faits à un, deux et trois ans, avec les intérêts de 7 pour cent.”

The defendant, in his answer, admitted the execution of this obligation, and alleged that the plaintiff was indebted to him in the sum of \$7,310 12, composed of \$2,605, the half of attorney's fees paid by him and his syndic, for the defence of suits in which plaintiff was jointly interested with him, and \$4,695 12, principal and interest of a note owned by defendant, and which was paid by the makers to plaintiff for defendant, all of which he plead in compensation.

The plaintiff pleaded prescription against defendant's demands in compensation. The district court sustained the plea of prescription, and gave judgment against the defendant, in favor of plaintiff, for the amount claimed, and the defendant took this appeal.

The defendant failed to establish the first item of his demand, being for one-half of attorney's fees.

The only things remaining to be examined are relating to the note, said to have been collected by plaintiff for defendant, and the plea of prescription filed by plaintiff.

E. C. Debreuil, sworn, says : In looking over the books, he finds that the note of the tobacco warehouse, in favor of Alexander Lesseps, was paid to Mr. Millaudon ; the entry showing said payment reads as follows, in the books of F. de Lizardi & Co., on credit side of Millaudon's account :

September 30, 1843. By M. de Lizardi & Co., in liquidation for note of the tobacco warehouse company, in favor of Alex. Lesseps, protested ; but paid by Mr. Millaudon, as per judgment obtained..... \$3,395 00
At 8 per cent. per annum, add interest eighteen days, to 30th September, 1842..... 10 18

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\$3,405 18

This witness further says, that he recollects the transaction well; knows that the tobacco warehouse owed Lesseps for bricks furnished by him, and for which they gave him their note, which note was given by Lesseps to Millaudon for collection ; and, from the entries in the books in court, he supposes it is the same note, and that it was paid. * * *

Defendant introduced in evidence the entry in Millaudon's account current books, called for and produced by him, which reads as follows, to wit :

Dr.

Cr.

F. de Lizardi & Co. in account current, with interest to 30th September, 1842, with L. Millaudon.

1842. Sept. 12th. Note of tobacco warehouse of A. Lesseps, charged by agreement to this account..... \$3,395 00
Interest..... 10 18

Offered also the following entry, same book, page 440 :

October 30, '43. Mr. L. Millaudon, to F. de Lizardi & Co., Cr.

1842. Sept. 30. To this sum charged in his account current of 30th Sept. 1842, as amount of note of tobacco warehouse company, to Alexander Lesseps, with interest..... \$3,395 00
Should be as follows :

Note due 4th June, 1840..... \$2,600 00
Interest from 4th June, 1840, to 12th Sept., 1842,
830 days, at 5 per cent..... 299 71
\$2,899 71

Due F. de Lizardi & Co., cash, 12th Sept., 1843..... \$495 29
New Orleans, 9th December, 1843.
(Signed)

F. DE LIZARDI & Co.,
in liquidation.

The above entry shows that it is an account rendered by F. de Lizardi & Co. to L. Millaudon, and the latter entered it in his own books.

Defendant also offered the entry in the journal of F. de Lizardi & Co., in liquidation, at page 120 :

Dec. '43. Laurent Millaudon, on account No. 2, to M. de Lizardi & Co., in account for this sum charged in his account current, 30th September, 1842, journal, p. 101, note of A. Lesseps..... \$3,395 00
Which should be note due 2d June, 1840, tobacco warehouse company to A. Lesseps..... \$2,600 00
Which should be interest from 4th June, 1840, to 12th Sept. 1842, 820 days, 8 per cent. \$299 71.... \$2,899 71
\$495 29

From the testimony of *Debreuil*, and the entries in the books of plaintiff and of de Lizardi & Co., we are satisfied that the note due by the to-

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tobacco warehouse company was held by defendant and collected by plaintiff, by being placed to his credit in his account current with de Lizardi & Co. It appears that, in an account current of 30th September, 1842, the plaintiff had been credited for said note, with \$3,395 instead of \$2,600 and interest to that date; the error having been discovered, de Lizardi & Co. made an entry in their books showing and correcting this error, and charging Millaudon with the difference as a balance due, cash, 12th September, 1843, with \$495 29. This entry or amount is dated New Orleans, 9th December, 1843, and signed by F. de Lizardi & Co. in liquidation. This rectifying amount was entered in Millaudon's books as of *October* 30, 1843; by this entry it is clear that the plaintiff acknowledged the error, and that he owed said balance to de Lizardi & Co., and also that he had received and had in his hands on that day, for defendant, as proceeds of the note due by the tobacco warehouse company, in principal and interest, the sum of \$2,899 71; and that he had not accounted to the defendant for his agency. C. C. Art. 2974; 10 R. 481.

The plaintiff, having taken charge of the collection of the note in question, became a special agent of defendant in regard to it, and in correcting the error by this entry in his books he acted as agent; and perhaps his agency ceased here, say on the 30th October, 1843, according to the entry in his books; and prescription may have commenced to run from that day; the action that defendant had against plaintiff was a personal action which could be prescribed only by ten years. C. C. Art. 3508; *Cooper v. Harrison*, 12 A. 631; Troplong, Prescription, vol. 2, Art. 490. According to the written obligation sued upon, the defendant became indebted to the plaintiff, on the 7th December, 1852, for \$3,996 50, with 7 per cent. interest per annum from that date. The plea in compensation has a retroactive effect to the time when the plaintiff and defendant became indebted to each other. C. C. Art. 2203. Now, suppose that prescription commenced running in favor of plaintiff from the 30th October, 1843, the ten years prescription was not acquired on the 7th December, 1852. The plea of prescription must be overruled, and the compensation allowed. C. C. Art. 2204; 10 R. 196.

The proceeds of the note were received by the plaintiff by being placed to his individual credit in his current account with de Lizardi & Co.; having employed them to his own use, he owes legal interest on the same, say from the 30th October, 1843, to the 7th December, 1852. C. C. Art. 2984.

The plaintiff was indebted to the defendant, on the 7th December, 1852, in principal and interest, in the sum of \$4,219 40, exceeding, by \$222 90, the amount claimed in the petition. The defendant has not prayed judgment for any excess or balance.

It is therefore ordered, adjudged and decreed that the judgment of the District court be annulled and reversed; that the plea of prescription to the demand in compensation be rejected; that the respective claims of the parties be declared compensated and extinguished to the sum of \$3,996 50; that the defendant pay costs incurred prior to the 16th January, 1860, and all subsequent costs, and those of this appeal to be paid by plaintiff and appellee. C. P. Arts. 370, 371.

WILLIAM BAKER v. F. MICHINARD.

A party cannot be called into court and then have his capacity to stand in judgment questioned.

APPEAL from the Sixth District Court of New Orleans, *Duplantier, J. A. Saucier* for defendant.

E. Cambray and H. Train for plaintiff.—In this case, an order of seizure and sale was issued in the court below, upon a promissory note for \$1,500, evidenced by a notarial act of sale to defendant of one lot of ground with the buildings and improvements thereon.

The defendant enjoined the sale on the ground that plaintiff is not the *bona fide* owner of the note, and that he has the right to set forth against him the equities he had against Eliza Piet, the original owner thereof; said equities being: That at the time of the maturity of the note, to wit: on or about the 13th May, 1862, he tendered the amount thereof in the only funds then current, meaning, no doubt, Confederate money.

Defendant also avers that he verily believes that he is, and, for nearly two years, has been deprived of the civil possession and of the right of dominion over the property seized; and that his, petitioner's title and right of ownership in the same, is doubtful, and held in suspense by the government of the United States, through the combined action of the military authorities and of the United States treasury department.

A rule was taken by defendant in injunction (the plaintiff in the original suit), on the plaintiff in injunction, to have the injunction dismissed on the ground that plaintiff in injunction being not a loyal citizen, he cannot claim any relief at the hands of a loyal court.

The court ordered him to produce his oath of allegiance; and, having not complied with the ruling of the court, his injunction was dismissed; whereupon, the very judge who signed that dismissal, because plaintiff in injunction was not a loyal citizen, granted the present appeal to that disloyal citizen.

Now, defendant in injunction and appellee contends:

1. That, by his own allegations, plaintiff in injunction and appellant has shown no right of action, he having no real and actual interest in the case. C. P. 15.

2. That he is an enemy to the United States and cannot claim relief at the hands of this honorable and loyal court.

3. That, even if he was a loyal citizen, no legal ground for injunction is shown; as Confederate money has never been held, even by the so-called Confederate government, as legal tender; and this is the very ground upon which he relies to enjoin the sale, and therefore he is not within the purview of C. P. 739.

The motion to dismiss ought to be maintained.

JONES, J. This is an appeal from the Sixth District Court of New Orleans. The defendant, François Michinard, being sued *via executiva*, enjoined proceedings on the ground set forth in his petition of injunc-

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tion. A rule was taken by the defendant in injunction on the plaintiff to show cause why said injunction should not be set aside, on the ground that plaintiff, not being a loyal citizen of the United States government, "has not the right to stand in justice, nor capacity therefor." The rule was tried contradictorily; and, after argument, made absolute.

The injunction was dismissed with twenty per cent. damages on the amount of judgment enjoined against plaintiff in injunction; François Michinard and his surety on the injunction bond; Alice Caraters *in solido*.

The court below erred in dismissing the injunction. Whatever may have been the political status of plaintiff in injunction, who was really a defendant, contesting by that mode the claim of the original demand of the plaintiff in the executory proceedings, that is not a means to be used to deprive plaintiff in injunction of urging any legal defence he may have. To call a party into court and then object to his capacity to stand in judgment, is so inconsistent with every principle of justice that it cannot be tolerated by this court.

Therefore, it is ordered, adjudged and decreed, that the judgment of the lower court be reversed, the rule setting aside the injunction be dismissed, and the cause remanded for further proceedings, and the costs of appeal be paid by plaintiff and appellee.

STATE OF LOUISIANA, *ex relatione* of MARY E. TOOREAU, *v.* HON. R. T. POSEY, Judge of the Fifth Judicial District.

A judge cannot exercise his discretion relative to the time of the trial of cases. The legislature has established the terms of the courts. Neither can he refuse a judgment by default at the proper time; or grant a continuance, without the forms of law being strictly complied with. The judiciary is not invested by the constitution with legislative powers, and cannot deprive the citizen, by its rules, of his legal rights.

HYMAN, C. J. The relatrix, Mary E. Tooreau, avers that in September, 1865, she, as tutrix of her minor children, instituted suit in the Fifth Judicial District Court, for the parish of East Feliciana, against David S. Rhea, for \$2,851 95, with interest.

That on the second day of the term of the court, in October, 1865, the case being then ripe for default, she asked for a judgment by default against defendant, Rhea.

That the judge refused to grant the same, and continued the case, although defendant had failed to appear, or answer, or make a legal showing for a continuance; and that the court was thus closed against her.

She prays that the judge be ordered to show cause why he did not proceed to hear and determine the case according to law; and that a *mandamus* be issued, ordering the judge to try the same without delay.

The judge's response is, that he had adopted a rule for the term, (and that under similar circumstances he would renew it at another term), "that no cases should be tried except consent and criminal cases and matters of succession"; that he was induced thereto by reason of the dis-

tress of the people, and for the proper administration of justice; because of a petition of a large majority of the people of the parish, a resolution of the police jury, a memorial of the grand jury, and an application of the members of the bar.

The papers filed by the judge show the deplorable condition of the country, the result of the war; but neither the papers, nor the answer of the judge, show a legal justification for his refusal to try cases.

The legislative power has established terms of courts for the trial of suits.

It has stated, that a plaintiff may, on motion, take judgment by default against a defendant, if he appear not, within a prescribed delay. C. P. 310. The defendant did not appear within the delay, neither did he ask for further time to answer; yet the judge refused the right of judgment by default, accorded by law to plaintiff.

It has also stated, that it is not in the discretion of the court to grant a continuance of a case, except a party applies for it, and alleges sufficient cause to justify the same. See Article of the Code of Practice 468. This Article of the Code does not give to the judge authority to continue a case because a party applies for the same. The party applying must show some justification in his application, that is, some probability that injustice might be done him in the result of a trial, if forced upon him, which he might avoid by having time to prepare.

On such a showing *only, of the parties to a suit*, does the Article give to the judge the right of deciding in his discretion whether or not a continuance should be granted.

In this case the judge has, without even a request *from either party*, arbitrarily forced a continuance. He has yielded to solicitations of persons *not parties*, and deprived relatrix of the legal right of trial of her cause.

The judiciary is not, by the constitution, invested with legislative powers. It has no authority to deprive the citizen, by its rules, of his legal rights.

The judge must conform to the law, though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law, for the administration of justice, they must apply to the law-making power, and not to the judiciary.

The Hon. R. T. Posey, District Judge of the Fifth Judicial District, for the parish of East Feliciana, having refused, in contravention of the legal rights of relatrix, to grant a judgment by default in the case of *M. E. Tooreau v. D. S. Rhea*, and to try the same, it is ordered in the name of the State of Louisiana, that said judge set aside the continuance, and proceed in the case according to law.

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POSEY, J.

A. MILTENBERGER & Co. v. E. T. PARKER, Sheriff, et al.

Where a party comes into possession of property by *dation en paiement*, places his own clerk and other employees upon it, although he retains his transferrer as a manufacturer, the contract will be valid, and it cannot be seized for the debts of the latter.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
H. M. Spofford for plaintiffs. *Bentick Egan* for J. B. Sawyer, defendant.

HYMAN, C. J. J. B. Sawyer, one of the defendants, a judgment creditor of Marcelin, Eude & Co., caused, on the 30th day of June, 1860, to be seized under an execution, 250 barrels of bi-sulphate of lime, which plaintiffs claimed as their property.

Plaintiffs enjoined the sale thereof. Defendant denied that plaintiffs were owners, and alleged ownership in his debtors, Marcelin, Eude & Co. The judge perpetuated the injunction, and decreed plaintiffs owners of the lime.

This defendant appealed.

Plaintiffs claim to have acquired title from Marcelin, Eude & Co.; and, to enable them to recover, there should be proof that, at a time before seizure, Marcelin, Eude & Co. had, by contract translation of property, invested plaintiffs with ownership, and that they were in possession; or, if not, and their transferrors still remained in possession by a precarious title, there should be evidence that the contracting parties had acted in good faith, and that there was a real contract; for, if otherwise, the defendant had the right to seize and sell the property. Civil Code, 1916, 1917, 2456, 2629; 4 Rob. R. 437. 7 Mar. Rep. N S. p. 675.

Marcelin, Eude & Co. were manufacturers of bi-sulphate of lime, in New Orleans, to whom plaintiffs had made large advances, and on the 2d of April, 1860, as shown by journal of plaintiffs, introduced in evidence at the instance of defendant, they gave to plaintiffs, and put them in possession of same, to pay their indebtedness to them, 450 barrels bi-sulphate lime, 1,127 empty barrels, 113 barrels of lime, 86 barrels of sulphate, 18½ hogsheads brimstone, bi-sulphate of lime, apparatus, steam machinery, tools, paints, dray, etc.

Plaintiffs continued to carry on the manufacture of bi-sulphate of lime in the factory, when Marcelin, Eude & Co. had manufactured and expended money for the purpose. They had their own clerk to make sales, who accounted to them. They also employed the cooper who was working in the factory, for them, when the seizure was made.

There is further proof that the transfer was of all the property in the bi-sulphate manufactory, and at the time of transfer a valuation was made of the property, which was about \$8,750.

Eude left the country, and plaintiffs employed Marcelin to work in the factory and superintend the same.

It is further proved that the barrels seized were marked in the name of Marcelin, Eude & Co., that other barrels in the factory were so marked, and that some barrels brought there after the seizure were so marked.

We consider that plaintiffs have brought themselves fully within the requirements of the law.

They have proved that they became owners by a contract of *dation en paiement*, and, from its date, had possession of the property until seized. The barrels of lime seized being in the factory when seized, with the name of Marcelin, Eude & Co. on them, is sufficient proof of identity.

The proof that Marcelin worked in the factory and superintended it for plaintiff, does not destroy the evidence that they were in possession; and, if it did so, and established in him possession by precarious title, evidence fully proves a real contract made in good faith.

Fraud has not been alleged, nor is there proof that defendant was a creditor, when the contract was made.

Judgment affirmed, with costs.

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SUCCESSION OF CHARLES FERGUSON—OPPOSITION OF A. CHIAPELLA.

Where, after five years had elapsed from the maturity of notes, a party makes provision for their payment in an act of sale, it is a tacit renunciation of prescription. He acknowledges their binding effect on providing for their payment.

In an act of sale, a stipulation for another gives him, as to the sum due to him, all the rights and privileges which the vendor himself could exercise on the property sold.

A PPEAL from the Second District Court of New Orleans, *Morgan, J. S. Magne for opponent and appellant*.—1. Obligations are extinguished by payment, novation, prescription, etc. C. C. 2126. A mortgage is accessory to a principal obligation. C. C. 3252. Hence, it follows that, when the obligation is extinguished by prescription, the mortgage is gone. 3253, 3374, Nos. 4 and 6, 1 Hen. Dig. (new ed.) p. 959; No. 1 and p. 960, No. 17; *LeBeau v. Gage*, 8 An. 474. And the creditors may claim the benefit of the prescription, although it was waived by the mortgagor. C. C. 3429. *Larthe v. Hogan et al.* 1 An. p. 330. *Blanchard v. Decuir*, 8 An. 504. 3 La. 201. *Succession of McGill*, 6 An. 345. *Girod v. His Creditors*, 2 An. 546. 2 Hen. Dig. (new ed.) p. 1233, Nos. 2, 3, 4 and 9. 1 Troplong, p. 115 et seq., No. 100. *Marcade on Arts.* 2225 N. C.

2. Such being the law, let us now proceed to apply it to the facts of this case. The notes, of which H. G. Ferguson is holder, were barred by prescription, one on the 1st September, 1848, and the other on the 1st September, 1849. From that day the mortgage was extinct, so far as we, mortgage creditor, are concerned. It is contended in the original brief

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that, by the act of 1855, the deceased merely put himself in the place and stead of the original debtor of these notes; and we think that it is a correct view of the fact; but, at all events, and whether the notes were or were not revived, surely the mortgage could not be revived; it was irretrievably gone. And even supposing, for the sake of argument, that the mortgage had been revived, which is a legal impossibility, it should be gone again, because more than five years elapsed from the 27th March, 1855, to the 28th March, 1860 (date of the filing of the *tableau*); and, besides, the fact of the debt being mentioned in the *tableau* could not have operated as an interruption of prescription, according to the authorities cited. 2 An. 546. 3 La. 201.

Race & Foster and James McConnell, contra.

HYMAN, C. J. The payment of three promissory notes drawn by Joseph Allen to order of H. Q. Ferguson, one for \$159 22, due 1st September, 1847, another for \$168 97, due 1st September, 1848, and the third for \$178 02, due 1st September, 1849, was secured by mortgage on certain immovable property, made by Allen to Ferguson on 16th September, 1846.

On the 27th day of March, 1855, Allen sold the mortgaged property to Charles Ferguson. In the act of sale it was stated that the note of \$159 92 was paid, and it was agreed that the two other notes, describing them, should form part of the price, for the sale of the property, and that C. Ferguson should pay them.

On the 27th May, 1856, C. Ferguson mortgaged this property to S. Magnier.

In the act of mortgage it was stated that the property was encumbered, as shown by certificate of recorder, by the obligation of C. Ferguson, taken, in the act of sale by Allen to him, to pay the two notes in place and stead of Allen. Some time thereafter Charles Ferguson died, and the administratrix of his succession filed an account of her administration.

On the 27th May, 1860, H. Q. Ferguson filed an opposition to the account, stating that he was a privilege and mortgage creditor for the amount of the two notes and interest, on the property sold by Allen to C. Ferguson, and prayed that he be paid by preference out of the proceeds thereof.

The judge rendered judgment, sustaining his opposition, and ordering him to be paid by preference; from which judgment A. Chiapella, as one of the creditors of the deceased, appealed.

The plea of prescription of five years is the only point presented to this court for consideration.

After five years had elapsed from the maturity of the notes, Allen made provision for their payment in the act of sale to C. Ferguson, which, if not an explicit, is certainly a tacit renunciation of prescription. He acknowledged their binding effect in providing for their payment. See Civil Code, 3423. But it is declared by the Civil Code that prescription is one of the modes of extinguishing debts; and as these notes were thus extinguished, it is contended that the accessory obligation of mortgage

was not revived by the renunciation of prescription. It would be of no avail, in this case, to examine this position.

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The vendor's privilege exists for the payment of the amount of these notes. They formed a part of the price that C. Ferguson, the vendee, was to pay for the property; and by his assumption he became the debtor for the whole amount of the notes. See Civil Code, 3216.

In the case of *Dupuy v. Lashall*, 17 La. Rep. p. 67, it is announced, that in an act of sale, a stipulation for another gave him, as to the sum due him, all the rights and privileges, which the vendor himself could exercise on property sold.

Appellant further contends that, as five years have elapsed since C. Ferguson assumed to pay, his estate is released by prescription. In the act of mortgage made by C. Ferguson in favor of S. Magner, May 27th, 1856, Ferguson stated that he had agreed to pay the notes. This acknowledgment interrupted prescription. See Civil Code, 3516 and 3486.

Between that date and the time of filing the opposition, five years had not passed.

H. Q. Ferguson, having the right of vendor's privilege, is entitled to be paid in preference to other creditors. See Civil Code, 3153.

Judgment affirmed; appellant to pay costs of appeal.

J. M. RELF & Co. v. JAMES BORO—JOHN WATT & Co., Garnishees.

In the transfer of debts, rights or credits to third parties, the delivery takes place between the transferor and transferee by the giving of the title.

The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferee may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act.

The property of the debtor is always held liable to his creditors until a full and complete transfer and tradition is made to the purchaser.

The creditors of a consignor can attach merchandize, or its proceeds, in the hands of the consignee, until the instructions, verbal or written, to pay the proceeds of sale to a third party have been communicated to, and the stipulation in his favor accepted, by him. The principle is, that the consignee must come under direct obligation to the assignee.

There is no such interest shown in a third party as to require him to be cited; nor to make it unsafe for garnishees to pay as ordered.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
T. J. & A. G. Semmes for plaintiffs. *W. H. Hunt* and *L. M. Day*,
 curators *ad hoc*.

HOWELL, J. This suit was commenced by attachment, and by a supplemental petition, filed on the 12th May, 1859, the appellants, John Watt & Co., were made garnishees, whose answers, with the interrogatories propounded, were as follows, to wit :

Int. 1. Are you acquainted with James Boro, the defendant herein, who lives in Memphis? If yea, how long have you known him?

Ans. Yes; by correspondence, since November, 1857, and personally since April, 1858.

Int. 2. Do you know such a person as Joseph Boro, or Joseph Boro & Co.? If yea, when and where did you first know him or said firm?

Ans. No.

Int. 3. Did you or not, some two or three months ago, have in your possession, or under your control, money, or credits, or notes, or bills of exchange, belonging to the defendant, James Boro? If yea, state the amount thereof on 1st March, 1859, and subsequently, and how much you now have on hand; and if you have none on hand now in the name of James Boro, was not a portion thereof or all thereof transferred on your books to the name of Joseph Boro, or Joseph Boro & Co.? and state how much you now have on hand in the name of Joseph Boro, or Joseph Boro & Co.?

Ans. This interrogatory is answered by the annexed copy of account current with James Boro & Co., from October 22, 1858, to May 7, 1859. We have now on hand at credit of Joseph Boro & Co. \$1,930 99. We pray that the said copy of the account current annexed be made part of this answer to this third interrogatory.

Int. 4. Who directed the transfer of funds on your books from the name of James Boro to Joseph Boro & Co., or Joseph Boro? If James Boro did, to whom did he give that direction, and was his direction given

in writing? If yea, annex to your answer a copy of said written direction.

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T.
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Ans. James Boro gave us the instructions to make this transfer, verbally, in our counting room, in the latter part of March, 1859.

Int. 5. Who controls the funds in your hands standing in the name of James, or Joseph Boro, or Joseph Boro & Co.? If James Boro controls funds standing in the name of Joseph Boro, or Joseph Boro & Co., by what authority does he do so? and, if that authority be in writing, annex it to your answers.

Ans. I do not know. Our account was kept with James Boro & Co., who instructed us, as before stated, to transfer the balance at their credit to Joseph Boro & Co., whom we do not know.

Int. 6. Is or is not the funds in your hands standing in the name of Joseph Boro, or Joseph Boro & Co., the property of James Boro, or has he an interest therein, and does he not control it as owner?

Ans. I do not know. All that I do know is, that James Boro & Co. instructed us to transfer the balance at their credit to Joseph Boro & Co. So far as we are concerned, we would not pay James Boro & Co. said balance, were they to draw on us, they having transferred said balance to Joseph Boro & Co.

(Signed)

M. MUSSON.

On the trial of the cause, and without any notice to the garnishees, judgment was rendered directing them to pay over to the plaintiffs the said sum of \$1,930 99, to be applied *pro tanto* to the satisfaction of the judgment rendered at the same time against the defendant.

The garnishees complain that this order was improvidently entered and is injurious, not merely to the rights of Joseph Boro & Co., but also to themselves, who are left open to the pursuit of Joseph Boro & Co.

The plaintiffs contend that the transfer, on the books of the garnishees, of the funds from the name of James Boro & Co. to Joseph Boro & Co., had no effect, and that, consequently, they could attach the same and obtain judgment therefor against the garnishees, on their answers, as showing an indebtedness to their debtor.

The first question for solution is, do the answers of the garnishees establish a legal transfer, prior to the attachment, by the defendant to Joseph Boro & Co.? And, if not, do they, in the second place, present such a state of facts as to require the plaintiffs to notify the garnishees before obtaining judgment against them?

1. We think that, tested by the principles of our laws, relating to the assignment of debts and other incorporeal rights, these answers fail to prove a transfer.

"In the transfer of debts, rights or claims, to a third person, the delivery takes place between the transferor and the transferee by the giving of the title." C. C. 2612.

"The transferee is only possessed as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferee may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act." C. C. 2613.

We can find in the answers of the garnishees, or elsewhere in the record, no evidence whatever of any agreement between the transferors and

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transferees, the giving of a title, or an acceptance by, or on behalf of, the transferees. Indeed, the garnishees confess entire ignorance of the alleged transferees, and of their right to control the funds held by them. The transfer on their books, as described, might operate as a title, in the meaning of the Code, when brought to the knowledge of and accepted by the transferees; but, until such event, the garnishees may be considered as the agents of the transferors, who may rescind their order and change the destination or direction of the funds.

It is a well settled principle of our law, that the property of the debtor is always held liable to his creditors, until a full and complete transfer and tradition are made to the purchaser. 2 L. 422. 14 L. 10. And, in the case of consignor and consignee, the creditors of the consignor can attach merchandize or its proceeds in the hands of the consignee, until the instructions (verbal or written) to pay the proceeds of sale to a third party have been communicated to, and the stipulation in his favor accepted by, him. 13 A. 551. The principle is that the consignee must come under direct obligation to the assignee.

2. Are the appellants entitled, under the facts presented in their answers, to notice before judgment can be given against them ?

In support of their right to such notice the garnishees rely upon the ruling in the case of *Estell v. Goodloe*, 6 A. 122, in which it was held that, when the answer of a garnishee does not contain an unqualified confession of indebtedness, the plaintiff should make the transferee or third person, disclosed as having an interest, a party to the suit, before final judgment can be given against the garnishee. The facts of that case, however, are different from those in this. There, the evidence of the garnishee's indebtedness consisted of certain notes not negotiable, which, by his answers, had been transferred by the defendant and payee, and against which he had an equitable defence. He did not admit unqualified indebtedness to any one. While, in this case, the garnishees show that they have in their hands funds which belonged, at one time, to the defendant, but which they, under instructions from him, transferred on their books to a third party; a proceeding which we have found to be ineffectual in law, and to have really transferred nothing. There is no such interest shown in a third party as to require him to be cited, nor to make it unsafe to the garnishees to pay as ordered. We conclude, therefore, that, upon their answers, the appellants are the debtors of the defendant, and that they are rightfully ordered to pay to the plaintiffs in attachment.

The correctness of this conclusion is sustained by the presumption arising from the silence of the alleged transferees, and the payment of \$5,000 by the garnishees, as shown by the account made part of their answers, to James Boro & Co., some weeks after receiving instructions to make the transfer on their books.

Judgment affirmed, with costs.

GEORGE SCHMIDT v. JACOB BARKER.

In the absence of any special agreement or understanding between a banker and a depositor, where the deposit is an irregular one; when an open account is kept; where moneys are deposited in bank to be drawn out, not in the identical funds deposited; where moneys deposited are mingled with the cash assets of the bank, and used indifferently with his own; the relations between a bank and its depositors are well and definitely fixed by our own law and jurisprudence, and by that of other countries, in which business is transacted with such institutions.

Such deposits are not real deposits, but are loans for use to the banker. The money so deposited transfers the property to the loanee; and the relation between a bank and its customers, in regard to irregular deposits so made, is simply one of debtor and creditor.

Legal agreements having the effects of laws upon the parties, none but the parties can abrogate or modify them; and it is incumbent on courts to give legal effect to all such contracts, according to the true intent of all the parties.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it, without any plea, at any stage of the proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and "*in pari causa melior est conditio possidentis.*"

Every condition of a thing impossible, or *contra bonos mores*, or prohibited by law, is null, and renders void the agreement which depends on it.

He who binds himself unwillingly, and under constraint, is not deemed, in the eye of the law, a participant in an illicit covenant.

If, from the plaintiff's own stating, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid.

A PPEAL from the Sixth District Court of New Orleans, *Leaumont, J.*
Durant & Horner for plaintiff.—1. A sum of money deposited with a banker is not a real deposit. L. C. 2904. The only real deposit. L. C. 2934.

2. Money thus deposited is "a loan for use" to the banker. See L. C. 2883, 2884; Story on Bailments, § 64, p. 65; *Matthews, Finley & Co. v. Their Creditors*, 10 An. 342; *Sims v. Bean*, 10 An. 346; Grant on Banking, page 1.

3. Loan for use transfers the property to the loanee. Troplong, Dépot, § 115, § 116; Pothier, Contract de Bienf. p. 71; *Melville v. Dodge*, 6 Murray, Granger and Scott; See 60 Eng. Com. Law Rep. p. 455; *Pott v. Clegg*, 16 Exchequer, 323.

4. In such a case the banker must pay, under all circumstances. L. C. 2891 *et seq.*; Pothier, Contract de Bienf. p. 108, § 50, chap. 4; Pothier on Obligations, No. 622, p. 337 of Evans' translation; 2 vol. § 622 of the Paris edition, 1813. See also *U. S. Bank v. Bank of Georgia*, 10 Wheat. 346, *et seq.*; *Commercial Bank v. Hughes*, 17 Wend. p. 100.

Jacob Barker pro se.—Now into court comes Jacob Barker, appellant, representing to this honorable court that the court below erred in giving judgment against him in the above entitled suit, the claim being founded on illegal and worthless notes received under an express agreement to be returned in the same description of paper, which says: "Deposits in this bank are received only on condition that the amount is to be drawn in Confederate currency;" and further, the balance in the bank book, introduced by plaintiff, is stated to be Confederate notes. The banking currency of the city was exclusively of that character at the time. The said agreement was also introduced by plaintiff.

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The Confederate notes were not demanded or refused; always held subject to order of plaintiff, and were filed in the above entitled cause with the answer.

Defendant insists that it was not competent for a military commander to change the obligation of contracts by any military order, however much they may have a right to interpret any contract brought before it for adjudication.

Defendant insists that the military orders relied on by the appellee do not apply to this case.

In a case of collections of seventy thousand dollars by the State Bank of Louisiana for a Tennessee bank, in which Mr. Barker was counsel for the Tennessee bank, tried before General Butler, he decided in favor of the State Bank of Louisiana, using the following language: "That he saw no propriety in interposing the authority of the United States between the bank who sent the Confederate notes to be circulated here and the bank who received them, and consequently permitted the latter to return them in kind."

In a case similar to this, a case in which Mr. Barker was interested, was brought before Judge Bell, of the provost court of the Department of the Gulf, in which he decided "that the military authority did not come here to annul contracts or to furnish parties with an excuse for violating faith."

Mr. Barker begs to refer to a case in Illinois, (see A. L. Freeman's reports, 32 Illinois, *Osgood v. McConnell*,) where the judges say, among other things: to permit such proof would be to alter, change or modify the agreement of the parties, which cannot be allowed.

Mr. Barker also begs leave to refer to the Digest of Opinions of the Judge Advocate General of the Army, p. 30, wherein it is stated, among other things, "that Confederate notes are illegal and disloyal publications, and as such are ordered to be destroyed wherever found; an application, therefore, on the part of a foreign resident, to restore a quantity of such notes to him as their former possessor, either in their original form or in Federal currency of an equal amount, cannot be entertained."

Mr. Barker begs leave further to refer this most honorable court to the opinion of Chancellor Kent, in the case of *Griswold v. Waddington*, in the Court of Errors of New York. See Johnson's Reports, vol. 16, p. 485, in which the Chancellor says:

"If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid."

"It would be difficult to state any principle of law more plainly founded in common sense and true policy, than that which declares, that a plaintiff must not appear, from his own showing, to have infringed the law of the land; and if he does, he cannot avail himself of the law to enforce a contract made in opposition to law. The plaintiff must recover upon his own merits; and if he has none, or if he discloses a case founded upon illegal dealing, and founded on an intercourse prohibited by law, he ought not to be heard, whatever the demerits of the defendant may be. There is, to my mind, something monstrous in the proposition, that a court of law ought to carry into effect a contract founded upon a breach

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of law. It is encouraging disobedience, and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books. There are cases in which a contract, fair and lawful, as between the two individuals who are parties to it, is not to be contaminated by other transactions, which might precede, or which might be the result of the contract. But even if an agent be a party to an original transaction, and the money in his hand be the proceeds of the illegal contract, no recovery can be had. (*Vide*, on this subject, Lord Kenyon, and Ashhurst J. in *Taylor v. Blair*, 3 Term Rep. 454; Rooke J. in 1 Bos. and Pull., 296; Story J. in *Fales v. Mayberry*, 2 Gallison, 560; *Hunt v. Knickerbacker*, 5 Johns. Rep. 327; *Hodgson v. Temple*, 5 Taunton, 181; *Faikney v. Reynous*, 4 Burr, 2069; *Petrie v. Hannay*, 3 Term Rep. 418; and the disapprobation of those two cases, in 14 Vesey, 192, *ex parte Daniels*.) Lord Alvanley lays down the true rule in *Monk v. Abel*, 3 Bos. and Pull. 25,) when he declares, that "the principle to be extracted from the cases on this subject is, that no man can come into a British court of justice to seek the assistance of the law, who founds his claims upon a contravention of the British laws.

I now conclude that, as the contract in this case was founded upon dealings during the late war, between the plaintiffs, who were resident citizens of the United States, and Henry W., who was a natural born and a resident subject of Great Britain, it was an unlawful contract, and cannot be enforced in the courts of this country.

Mr. Barker's bank has always been in the habit of receiving gold, silver, treasury notes and bank notes, paying its depositors in like funds, without reference to the fluctuations in value. He was particularly unfortunate in relation to deposits of gold and silver, and the sale thereof, the great advance being subsequent to his sales. This did not furnish any excuse for not paying back gold to those who had deposited gold, under the printed regulations of his bank.

Suppose that the deposit had been in counterfeit money, or a trunk of plate, could the bank be considered answerable for anything else?

ILSLEY, J. The plaintiff claims from the defendant, as the owner of the Bank of Commerce, in New Orleans, the sum of four hundred dollars, being the balance which he avers to be due to him, on moneys deposited by him in said bank, between the 17th day of January and the 1st day of April, 1862. He complains that this balance is due and payable to him in legal tender notes of the United States, but that the said defendant has illegally and wrongfully, without his consent, caused the plaintiff's bank book to be balanced, as a balance of account in Confederate notes, which the plaintiff himself terms "the treasonable issue of rebels in arms against the United States."

All these allegations are traversed by the defendant, who, however, admits that the said balance is correct as to amount, but sets up, in his defence, a special contract, by which he avers that deposits were received in his bank, at the period stated, only *on the condition* that the amount was to be drawn for in Confederate currency. And he further specially avers, that the balance of account was struck in the manner alleged by the plaintiff, with his full knowledge, and at his special request.

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The only question at issue, then, between the parties, is the mode in which the admitted balance is to be drawn out of the bank; in legal tender notes or in Confederate notes.

In the absence of any special agreement, or understanding, between a banker and a depositor, when the deposit is an irregular one; when an account is kept; where moneys are deposited in bank, to be drawn out, not in the indential funds deposited; where moneys deposited are mingled with the cash assets of the bank, and used indifferently with his own; the relations between a bank and its depositors are well and definitely fixed by our own law and jurisprudence, and by that of other countries in which business is transacted with such institutions.

Such deposits are not real deposits, but are loans for use to the banker, The money so deposited transfers the property to the loanee; and the relation between a bank and its customers, in regard to irregular deposits so made, is simply one of debtor and creditor. See Arts. L. C. 2904, 2883, 2934, 2884. See the case of *Matthews, Finley & Co. v. Their Creditors*, 10 An. 343; and that of *Sims v. Bean*, 10 An. 346; Grant on Banking, p. 1; *Marine Bank v. Fulton Bank*, Wallace's Report, 2 vol. p. 252.

But the defendant relies on his contract with the plaintiff; and, if the agreement is a legal one, he might well invoke Art. 1940 C. C.; which says that, "Legal agreements, having the effect of law upon the parties, none but the parties can abrogate or modify them, and it is incumbent on courts to give legal effect to all such contracts, according to the true intent of all the parties." See sec. 2 of the same Article.

What was the agreement between these parties? It is *that* produced by the plaintiff himself; and it precedes in the bank book the statement of the account. It is as follows:

"Bank of Commerce, New Orleans, January 17, 1862. Deposits in this bank are received only on condition that the amount is to be drawn in Confederate currency;" and the currency is what the plaintiff himself calls the treasonable issue of rebels in arms against the United States.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it without any plea at any stage of the proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and *in pari causa melior est conditio possidentis*. *Davis v. Holbrook*, 1 An. 178; *State v. Lazarie et al.*, 12 An. 166; *Gravier's Curator v. Canaby's Executor*, 17 La. 132.

Article 2026, Louisiana Code, prescribes that "every condition of a thing impossible, or *contra bonos mores* (repugnant to moral conduct), or prohibited by law, is null and void, and renders void the agreement which depends on it;" and Pothier (art. 1, chap. 3, part 3) defines the conditional obligation as that "qui est suspendue par la condition sous laquelle elle a été contractée, qui n'est pas accomplie."

And in what light can this court, constituted as it is, and recognizing, as supreme and paramount to all other laws, the constitution and statutes of the United States, view a condition, on which a deposit is received, and which condition, voluntarily acceded to by the depositor, provides for and contemplates the aiding of the circulation of the treasonable issue of

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rebels in arms against the United States; of an issue put in circulation for the express purpose of facilitating and carrying on the rebellion; and which issue, on the very face of it, anticipates and purposes a disruption and dismemberment of the general government: as the notes so issued were only to be payable "six months after the ratification of peace between the *Confederate States* and the *United States*."

Such a condition in a contract is, in the words of the law, "a nullity, and renders void the agreement which depends on it."

The plaintiff was a party to this illicit contract, and his right to stand in judgment depends upon the nature of his connection with the obnoxious condition, and upon the contingency as to whether its illegality lies properly at his door.

Many of the French commentators draw a clear distinction between cases wherein both parties to the contract are compromised illicitly, and where one alone is guilty of infringing the law.

Gilbert in his *Code annoté*, vol. 1, p. 503, in his notes to Article 1133 C. N., says: "Les auteurs distinguent sur ce point entre le cas où la convention est illicite seulement du côté d'une des parties, et celui où elle est illicite des deux côtés. Dans le premier cas, celui qui n'a rien promis d'illicite est fondé à répéter ce qu'il a payé; dans le second, ni l'une ni l'autre des parties ne sont admises à exercer des répétitions l'une contre l'autre." V. Pothier, No. 43 et suiv.; Toullier, t. 6, No. 126; Duranton, t. 2, p. 687; Delomcourt, t. 2, p. 687, edit. de 1819.

Cette distinction est prise de Paul et d'Ulpien, dans les lois 3 et 4, § 2, de *Condict ab turp causa*.

It is hardly necessary to add, as was said in the case of *Gravier's Curator v. Carraby's Executor*, 17 La. p. 128, that *a fortiori* the law will not lend its aid to enforce the performance of such contracts in the first instance. Duranton, with his usual aptness at illustration, demonstrates such a case as would save one of the contracting parties from the effect of an illicit agreement. It would be one in which his participation therein was caused by the force of circumstances that he could not resist, without entailing on him grievous injury. That author says: "Quelquefois cependant, la cause de l'obligation de l'une des parties est illicite, sans que l'objet de l'obligation de l'autre le soit: tel est le cas où vous vous obligez à me restituer un dépôt que mon père vous a confié, sans en avoir retiré une reconnaissance, et que vous exigiez une promesse de ma part de vous payer pour cela une certaine somme.

"L'objet de cette obligation, la restitution du dépôt, est très licite, mais la cause de mon obligation de vous payer la somme est illicite, non pas sans doute par rapport à moi, mais par rapport à vous qui avez exigé une promesse pour faire ce que l'équité et le droit vous obligeaient de faire sans aucune rétribution." Duranton, Art. 366, liv. 3, tit. 3.

In the example suggested by this author, he who binds himself unwillingly and under constraint is not deemed, in the eye of the law, a participant in an illicit covenant. But was this the case with the plaintiff in this suit? Clearly not; but the very reverse of it. His acquiescence in a contract that violated the law, and tended to endanger the public safety, was entirely voluntary, of his own free will, and with his eyes open.

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His participation in the illegal contract was immoral, being, as it was, in violation of law. See the case of *Davis v. Holbrook*, 1 An. 175.

What was due to plaintiff by his contract with the defendant? Four hundred dollars in Confederate money. If the shadow of a legal cause of action were disclosed in this case by the plaintiff, it is so coupled with the illicit condition as to be inseparable from it.

The whole contract is an absolute nullity; and *quod nullum est confirmari nequit, quod nullum est, nullum producit effectum*. "*Nemo auditur propriam turpitudinem allegans.*"

The doctrine taught by Chancellor Kent, in the case of *Griswold v. Waddington*, in the Court of Errors, New York, meets our fullest approbation. He says: "If from the plaintiff's own stating, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid."

It would be difficult to state any principle of law more plainly founded on common sense and true policy, than that which declares that a plaintiff must not appear, from his own showing, to have infringed the law of the land; and, if he does, he cannot avail himself of the law to enforce a contract made in opposition to law. The plaintiff must recover on his own merits; and if he has none, or if he disclose a case founded upon illegal dealing, and founded on an intercourse prohibited by law, he ought not to be heard, whatever the demerits of the defendant may be.

"There is," says the Chancellor, "to my mind, something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience and giving disloyalty its unhallowed fruits.

There is no such mischievous doctrine to be found in the books."

The judgment of the lower court, which was in favor of the plaintiff, must be reversed.

It is therefore ordered, adjudged and decreed, that the action of the plaintiff be dismissed, and that plaintiff pay the costs in both courts.

SAME CASE.—APPLICATION FOR A RE-HEARING.

May it please your honors: The plaintiff and appellee, Schmidt, respectfully asks for a re-hearing in this case.

The plaintiff alleged, on the 2d day of June, 1864, that his balance of account in Jacob Barker's bank was \$400, and that the same was payable to him in legal tender notes.

The relations between a banker and depositor are those of simple debtor and creditor, and the acts of Congress make treasury notes a "legal tender in payment of debts." Therefore, Barker, he said, owed him \$400, in treasury notes, which was true, if Barker owed him anything at all.

The plaintiff also averred that recently, *i. e.* with regard to the filing of petition, 2d June, 1864, Barker had, in striking the balance of his deposit account, wrongfully, illegally, and without the consent of petitioner, stated this to be a balance of account in Confederate notes, which was

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false, as the balance was simply, as appears by the book itself, one of "dollars," for which the United States treasury notes were a legal tender.

In answer to this, Barker says that plaintiff deposited with him the nominal amount of \$1,350, in "Confederate notes, under a special contract to receive back the same description of paper;" to this is added the averments of many different agreements, on the part of plaintiff, to receive "Confederate notes" for his debt.

What was the proof in this case?

The defendant offered no proof at all. All the averments of his answer are therefore unsupported by evidence.

The circumstance that Barker annexes to and deposits with his answer certain four one-hundred-dollar Confederate notes, is of no value against the plaintiff, because those notes are not proved to be what plaintiff deposited. These were not offered in evidence on the trial of the cause in the court below; there was no evidence of any kind offered there in regard to them, and the Supreme court has no power to look at them at all, as instruments of proof to make out the defendant's case. For all purposes, they must be legally considered as not existing. They were filed by the defendant in the court below with his answer, but the record is destitute of all evidence about them; how can this court, then, allude to them at all? How does this court learn that these were the notes which plaintiff deposited with defendant?

Plaintiff has not admitted it. The defendant has not proved it. How, then, can this court take it for a fact.

Would not the case be a hard one for plaintiff if all the allegations defendants choose to put in their answers are to be taken as true, without proof?

The bank book of plaintiff does not say that the deposits were made in Confederate notes, but does say they were made "in cash." The memorandum at the foot of the account, defendant states to have been made in 1864, without his consent.

This is his admission, with regard to the entry, and there is no other proof in the record about it. His admission can only legally be taken as he makes it: it is, that he did not consent to the balance being struck payable in Confederate notes; that is all he admits. Why should this court take it for granted, in the absence of all proof on the other side, that he consented to a balance in Confederate notes, in May, 1864, two years after the circulation had been forbidden by the highest law of the department (State), and to him they were absolutely worthless. Nor is there any proof that the plaintiff deposited Confederate notes with defendant; the deposits are represented in the bank books as "cash." It is true that a memorandum above the deposit entries saying, that "the amounts are to be drawn in Confederate currency;" but, at that time, January 1862, the defendant may have considered this as a method of showing his devotion to the sacred cause of liberty and independence, in the fashionable phrase of that day. At that time, too, the court knew, as a matter of history, that the notes of the banks of New Orleans, and those issued by the city corporation, were in general circulation; so that it cannot be presumed, in the absence of proof, that the deposits were made in Confederate notes.

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Let us now suppose, in the absence of proof on the point, and for the sake of argument, that the deposits were made in Confederate notes, "the treasonable issue of rebels in arms against the United States" (a style of designation which is apparently attractive), what then? They are received and entered on plaintiff's pass book as "cash" in dollars. What was the effect of such an entry in plaintiff's book? Why, to make him a creditor of defendant for so many dollars! not the very dollars, recollect, which plaintiff deposited; for there is no question here really of the contract of deposit, but of the contract of loans for consumption.

The law governing their relations is, therefore, that of the Louisiana Code, Art. 2882. "By the effect of this loan the borrower becomes the owner of the thing lent, and if it be astrayed, in whatever manner the same may have happened, the loss is on his account."

If in this case the loan was made in Confederate notes, which we admit *argumenti gratia*, then, these having been destroyed, *i. e.* rendered worthless by the collapse of the rebellion, the loss is on the defendant.

But the text and provisions of our code do not stop here. Article 2884 says: "The obligation which results from a loan of money can never be more than the numerical sum mentioned in the contract." But that he is bound to pay! He must pay the numerical sum, which means the number of the standard (in this case dollars) mentioned in the contract.

And, says the same Article in continuation: "If there has been augmentation or diminution of the value of the specie" (*i. e.* the kind of currency loaned) "before the time of payment, the debtor is bound to return nothing more than the numerical sum" (and consequently he can return nothing less than that) "in such specie as has currency at the time of the payment."

In the case at bar, the time of payment was the months of May or June, 1864, when the bank pass-book was balanced, and when "Confederate notes" were not only worthless, but prohibited as a circulating medium; according to the Code, then, the depreciation must be borne by Barker, and he must pay the sum loaned him in "legal tender," the specie which has currency at this time.

The proclamation of May 1st, 1862, issued by the major-general commanding the national forces, declared that the circulation of Confederate notes was permitted "until further orders." See General Order, No. 1, May 1st, 1862.

On the 16th May, 1862, the major-general, by Order No. 29, prohibited all circulation of or trade in Confederate notes, after the 27th May, 1862.

And by General Order No. 30, 19th May, 1862, after setting forth, in the strongest terms, the treason and bad faith of the public and private bankers of New Orleans, the major-general commanded: "II. That all private bankers, receiving deposits, pay out to their depositors only the current bills of the city banks, United States treasury notes, gold or silver."

This is the supreme law of the department (State of Louisiana), has been, since 1862, and is now in full force, and of higher force than any statute of Louisiana.

Re-hearing refused.

RICHARD MURPHY v. THOMAS GUTIEREZ.

In a redhibitory action the prescription of one year does not apply, except from the date of the discovery of the vice; and then not in the case of an absentee against whom no process could issue within that period. "*Contra non valentem agere non currit prescriptio.*"

A PPEAL from the Sixth District Court of New Orleans, *Leaumont, J.*
C. Dufour for plaintiff. *Geo. L. Bright, Curator ad hoc*, for defendant and appellant.

LSLEY, J. This is a redhibitory action to rescind the sale of a slave and to recover the price, with damages.

It is alleged and shown, that the sale, with full legal warranty against all the maladies and defects prescribed by law, took place on the 20th February, 1860.

It is also proved that, immediately after the sale of the slave, the vendor broke up his domicile in this State and departed for Spain, his native country, whence he has never since returned.

The sale was a fraudulent one.

The action was originally instituted on 23d June, 1863; but as the defendant, one *Avendano*, against whom proceedings were commenced, as soon as it was ascertained that he was the agent of the defendant, excepted, on the ground that he was not authorized to appear in court, an attachment against the defendant's property, then but recently discovered, was sued out.

The boy was diseased at the time of the sale, to the knowledge of the defendant, who fraudently concealed the fact from his vendee, and the slave died of the same disease, in the year 1863.

The prescription of one year is relied on to defeat the plaintiff's claim. See Art. 2512 L. C.

This prescription is not applicable to the present case, as it falls within the exception in section 1 of that Article, which says:

"This limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser."

In such a case, "the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice." Art. 2524.

But more than a year had elapsed between the discovery of the vice and the service of the petition.

If the defendant had continued to reside in the State, during the whole year after the discovery of the vice, the plaintiff's action would have been barred; but he broke up his establishment and quit the State permanently, before the expiration of the delay, leaving in it neither domicile, nor known agent or property, so that the process could reach him within a year; nor, indeed, until the plaintiff ascertained that he had left an

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agent and property in the State, when proceedings against both were immediately commenced and process served. Till the plaintiff's action was instituted, it was impossible for him to act.

He invokes the equitable rule, "*contra non valentem agere non currit prescriptis*," and it must prevail.

See the cases of *Morgan v. Robinson*, 12 Mar. 76 (old series); *Landry v. L'Eglise*, 3 La. 221; *Guilliet v. Erwin*, 7 La. 581; *Smith v. Taylor*, 10 Rob. 133; *Martin v. Jennings*, 10 A. 553; *Boyle v. Mann*, 4 A. 170; *Reynolds v. Batson*, *Same v. Brenford*, 9 A. 729.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be affirmed, with costs in this court, to be paid by the defendant and appellant.

A. F. COCHRAN & HALL v. BARK CLEOPATRA et als.

Carriers are not liable for damages occasioned by accidental and uncontrollable events.

APPPEAL from the Sixth District Court of New Orleans, *Howell, J.*
C. Roselius and *A. Philips* for defendants.

J. Ad. Rozier for plaintiffs and appellants.—This is a suit to recover damages by reason of a breach of the contract of affreightment. Plaintiffs, on the 21st of December, 1859, shipped on board the *Cleopatra*, at Marseilles, for the port of New Orleans, a certain quantity of walnuts, to be delivered in the port of New Orleans.

P. E. Caillot deposes that, as a merchant at Marseilles, he shipped the walnuts in good order and condition. The shipment began on the 16th, and was completed on the 19th December, 1859. The vessel was first advertised to leave from the 5th to the 10th day of December. The vessel sailed on the 8th February, 1860. She was first advertised to sail on the 8th of November, 1859. In consequence of the captain delaying or refusing to depart, he made a protest. He was informed by the ship brokers that the *Cleopatra* would sail at Christmas, the farthest; the weather was not unfavorable; parcels of walnuts, proceeding from the same lot, purchased and shipped at the same time, among which twenty-five bales sent to New York, by the *Ella Cooper*, arrived in good condition.

Carrier bound to deliver within reasonable time. *Rathbone v. Neal*, 4 An. 563.

1. The master of the vessel was in default; he should have sailed on the day advertised. No custom, attempted to be proved, can exonerate him from the responsibility; he was bound to keep his promise, made in the advertisement. On the 5th day of December, a protest was made by the shippers, wherein it is established "that he shipped goods on board of the *Cleopatra*, on the 1st day of December, on the promise made by

the ship's agents, that she would sail positively on the 5th day of December; that, instead of sailing on that day, she remained in port till the beginning of February, 1860. COCHRAN & HALL
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There was a special promise made to the shipper, as to the time of departure, otherwise he would not have shipped them.

The weather did not prevent the Cleopatra from sailing, as it will be seen by the testimony of *Alby*. The ships are named that sailed in December and January. See also *Aicard*, who deposes substantially to the same facts, and adds: "The Cleopatra might have taken her cargo in twenty-five or thirty days; the weather was not the cause of the delay."

The judge of the lower court errs in saying: "There was a delay, beyond the anticipated time, of about 18 or 20.... He forgot that the testimony of the witnesses, who swear that the special promise made was the 5th of December! This is not contradicted. From the evidence it appears the Cleopatra was detained upwards of two months.

2. Was there any excuse for this delay? The judge says, it is accounted for by wind, bad weather, difficulty in shipping a crew, and sickness of the captain, and in the further difficulty of immediately procuring a full miscellaneous cargo in the port of Marseilles.

We think that the evidence shows a different state of facts. As to the weather, the fact of the departure of other vessels shows that there was no such cause. The difficulty in shipping a crew is hard to believe, in such a port as Marseilles. There is no evidence substantiating this in anything of a satisfactory manner; it is an after-thought. Sickness of the captain? How is this proved? The further difficulty in procuring a cargo? But the vessel was advertised to start on a particular day, and it does lie in the mouth of the master to say, that he did not mean it. Our witnesses are the well known and respectable business men of Marseilles.

The first witness of the defendant is the mate; and the bias of this man, in the employment of defendant, is apparent. He talks of the inclemency of the weather! forgets the departure of other vessels. He makes the statement that the walnuts arrived in New Orleans, in apparent good order; flatly contradicted by witnesses *Graus*, *Cazaire*, *Trinchard*. Their next witness is *Olivari*; also *Bartolomeo Olivari*. What they say is exaggerated, as to the time it takes a vessel to load in Marseilles, and has no bearing on the point at issue here. The master undertook to sail on a day fixed. Their other witnesses are *Guerlamo*, *Lavarelli* and *Bartholomo*, sailors, like the others, and attribute the delay to stress of weather.

If this was the fact, how is it that the master did not prove it by witnesses of known respectability in Marseilles, instead of resorting to biased sea-faring men? We have established a different state of facts by persons residing in Marseilles.

3. Had the master departed at the time promised, the walnuts would have arrived here, sound, in the port of New Orleans. It was all the fault of the master; he is bound to repair the damage. The amount of damages sustained will appear by the testimony of *Graus*, *Cazaire*, *Trinchard*, *Gregorio*. The walnuts, when they arrived, were heated and rancid. They had no appearance of being damaged by salt water; they were full of worms. The sale was properly advertised.

COCHRAN & HALL v. HYMAN, C. J. Plaintiffs shipped on 21st of December, 1859, in the
BK. CLEOPATRA port of Marseilles, on the bark Cleopatra, a number of bales of walnuts,
to be delivered at New Orleans.

They sued to recover the loss resulting from the damaged condition of the walnuts.

The lower court gave judgment against plaintiffs, and they have appealed.

On the 9th February, 1860, the bark left Marseilles, and arrived in New Orleans about the 13th of June, 1860. The voyage is usually made in forty-five or fifty days; but the Cleopatra took four months to complete it. This is accounted for by a severe gale, on the 10th of February, which so disabled the bark that she had to make for the first port to be repaired. The time consumed in repairing her was about fifty days. She then continued on her voyage. It is not pretended that she was not sea-worthy when she left Marseilles, or that the walnuts were not properly stored. The evidence satisfies us that the walnuts were damaged, being of a perishable nature, by the length of time consumed in the voyage.

Plaintiffs contend that the damage was caused by unnecessary delay at the port of Marseilles.

It is in evidence that it takes much time in loading vessels at that port; sometimes three months or more. They have to be loaded by means of lighters.

The mate testified that the delay in taking in the cargo of the Cleopatra was caused by bad weather, and that she was loaded as speedily as possible.

There is no proof that the delay in the port of Marseilles was the cause of the damage.

The probability is that the vessel would have delivered the walnuts in good order but for the storm at sea.

Defendants are not liable for damage occasioned by accidental and uncontrollable events. C. C. 2725.

Judgment affirmed.

HOWELL, J., recused.

MORRIS L. DUNCAN v. CHRISTIAN BOYÉ.

No bailee is responsible for not insuring goods under his charge, unless he has instructions so to do.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Hornor for plaintiff and appellant.—Plaintiff sues defendant for goods sold and delivered, to the amount of \$1,959, and files his invoices with his petition.

The defence is lengthy : 1. The general issue. 2. A special denial that defendant ever ordered the goods, and a statement of the course of trade between him and plaintiff. 3. That the invoices of April, May and June, 1860, were lost by fire in August, 1860; and, consequently, defendant is not liable for them. 4. That a portion of the goods received since the fire are unsaleable, and he is willing to return them. 5. That he has sold the rest of the goods, and is willing to pay for them at wholesale Cincinnati prices. 6. The want of any amicable demand. The prayer of the answer is that this suit may be dismissed.

The judgment of the lower court was for \$764 20, and from it plaintiff has appealed suspensively. We propose discussing each item in this labored defence in its order, and will then recur to the judgment of the lower court.

And, 1. As to the general denial, there is no doubt that all the goods charged in the invoices were received by Boyé. The general issue is waived by the special defence. 2. Boyé denies ever having ordered the goods from plaintiff, for which he claims payment. This is a grave error of fact. The course of trade between the parties was peculiar. Duncan was a manufacturer; Boyé a seller. "Boyé would write for furniture, and Duncan would send it on his orders; and Duncan would send furniture without orders, often." Boyé has received all the goods contained in the invoices. All the goods in the first three invoices were burned, nearly. All the other goods in the remaining invoices have been sold, except some bureaux. Admission in answer.

Though the evidence leaves the point in some obscurity as to the goods received after the fire, yet we think it is plain that, as to all the goods received before the fire, the relations of the plaintiff and defendant were those of vendor and vendee.

"Proof that the goods have been delivered to the defendant, and that he has used them, is *prima facie* evidence of a contract, without proving any order." 2 Starkie's Ev. p. 837.

It seems to us that defendant strives to change these legal relations, and introduce others for the purpose of sustaining an unfair defence, after he has long acquiesced in plaintiff's way of doing business.

The bill sued upon gives credit for Boyé's note, dated 28th November, 1860, at sixty days' date, the note itself, introduced by defendant; the settlements were made semi-annually. And at the foot of the bill sued

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upon, are found these words: "Interest on the above bills four months after date."

It is, then, clear that, at the date of the note, and even at its maturity, 30th January, 1861, if "defendant's theory" be correct, not a dollar was due by him to plaintiff. It is not usual for merchants, and specially such merchants as the defendant, to pay in advance. No such thing is alleged. Defendant owed at the date of the note what was due and payable, to wit: the goods contained in the first three invoices. It was a full admission that he owed for them, up to the amount of the note, on the day the note was dated. It was in accordance with his promise to pay for them, made to plaintiff in Cincinnati, as soon as he received his insurance. The note was on account of the shipments made in April, May and June. Goods shipped in the fall were settled for in the spring, and goods shipped in the spring were settled for in the fall.

The other facts in this case entirely harmonize with this statement; and the whole is altogether inconsistent with the idea thrown out in defendant's answer, that this was a payment on the invoices of September and October. Indeed, the statement in the answer itself is inconsistent. It alleges that the goods in these invoices were disposed of between the latter part of 1860 and the spring of 1862. Even Déjean does not substantiate defendant's story. *Fraus est celare fraudem.*

A payment is, in its nature, though not in its essence, posterior to the debt. *Thomas v. Elkins*, 4 Martin, 378.

None of the goods, so far as the evidence shows, were sold prior to the date of the note or its maturity. And no attempt has been made to prove that this payment was made on the invoices of September or October. The whole course of business between the parties contradicts the assumption.

The note is an admission for value received at its date; and the attempt to pervert its meaning can only rebound upon its maker.

Receiving the goods and paying for a portion, not in any way defined, makes the defendant the owner of the whole. He is, therefore, liable for the invoices of 13th April, 25th May and June 9th, amounting to \$763.

The lower judge, however, has entirely rejected this portion of our claim.

We advance to the third point of the defence, viz: that the invoices of April, May and June, 1860, were lost by fire in August, 1860, and consequently, defendant is not liable for them. This was sustained by the judge below, probably upon two grounds: 1. That the course of dealing continued the ownership in Duncan till the goods were sold, and *resperit domino*. 2. That the evidence showed no new contract by which Boyé bound himself to pay the loss.

This defence of *vis major* must, to be successful, be clearly made out. And, in the first place, your honors must be satisfied that defendant was not the owner of the goods; for, if he were the owner at the time of the fire, the loss was his, undoubtedly. That he was the owner, we think we have clearly shown.

But, if he were not the owner, what was he? In what legal relation did he stand towards the plaintiff? It may have been that of agent and principal, bailor and bailee; or Boyé might have been a mere *negotiorum*

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gestor. They were dealing together on some terms, and plaintiff had the right to call upon him for an account, as trustee, unless defendant was the owner.

In this view of the case, when defendant is asked for payment, or for an account, he says the goods were all burned, "as well the goods belonging to the respondent as those belonging to the plaintiff;" and he proves the fact fully and satisfactorily. But there is always fault to be attributed to a person who sets up fire as a defence. Some cases of *vis major*, such as inundation, earthquakes, hail, snow, storms and tempests, the acts of government, war, an attack by brigands, an abuse of force, excuse all idea of fault and imprudence; others do not; and to this class belongs fire. *Larombière on C. N.* 1148; *La. C.* 1927, 2216.

Defendant carefully keeps out of view that he was insured against fire. That he was insured, results from his promise to pay after he collected the insurance money. He was a trustee. He was bound to take the same care of his principal's property as of his own. When he alleges a total loss of his own stock by fire, he alleges what is not true, when he collects a portion or the whole of its value from the insurance companies. Here, the whole matter rests within his own knowledge. He suppresses every detail of it. In such a case, every thing must be taken against him. *Ralston v. Barclay*, 6 Martin, 653; *Berthoud v. Gordon et al.*, 6 La. 583.

We now come to the fourth ground of defence, that a portion of the goods received since the fire are unsaleable, and that he is willing to return them.

These goods are still in the hands of the defendant. We do not think, even if your honors decide that they are ours, that, after a lapse of thirty months, we should be non-suited on this portion of our claim. When Kelly asked defendant for a settlement, he did not refuse payment, nor did he claim any deduction on account of goods having been burnt. Nor does it appear that he has ever made any real tender followed by consignment. *La. C.* 2163, et seq.; 12 An. 267. If the court considers them his property, he must be made to pay for them. If not, he should be ordered to deliver them, at his own expense, to the plaintiff, at any place in this city he may designate.

C. E. Schmidt for defendant.—I am at a loss to conceive upon what grounds the plaintiff bases his hope of a reversal of the judgment of the lower court. In the oral argument before that court, his counsel insisted that the plaintiff's goods should have been insured by the defendant. This the latter had never been requested to do, and had never done, and Duncan was never charged any insurance premium. How could Duncan pretend not only to thrust his goods upon the defendant, *nolens volens*, use his store-rooms and warehouses, without paying storage, and moreover, expect the defendant to pay the insurance on his goods, although he had never instructed him to insure? That this pretence of the plaintiff is unfounded, either in law or in equity, is apparent from a reference to the following cases: *Patterson v. Leake*, 5 An. 547; *Tonge v. Kennett*, 10 A. 800; *Gilly v. Berlin*, 12 A. 723. Besides, how can the plaintiff shift his position from that of a party claiming the price of goods which he

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alleges to have sold, to that of a party suing for loss occasioned by the neglect to insure those very goods?

LABAUVE, J. The plaintiff claims of the defendant the sum of \$1,950, with interest, balance on an account for house furnitures.

The answer contains, first, a general denial; denies that respondent ever ordered any of the goods which were shipped, without any solicitation and against the desire of respondent; that the goods, being sent in that way, remained the property of plaintiff; that respondent was to sell such portions of them as he could, and only account to plaintiff at wholesale Cincinnati prices for such as he might dispose of; that, after the three first invoices, a fire occurred, in August, 1860, which destroyed defendant's and plaintiff's goods; and that he is not responsible, etc. He prayed to be dismissed, at plaintiff's cost.

The District judge, after hearing the testimony, gave judgment for plaintiff, for \$764 20, with interest, and the plaintiff appealed.

The case turns entirely on matters of facts and upon the credibility of witnesses. There is, however, a bill of exceptions taken by plaintiff; but it is of no importance.

There is inconsistency between plaintiff's witnesses, who were examined under commissions in Cincinnati, and those of defendant, who testified in open court. The District judge seems to have given more credit to those who gave their testimony here in court. The plaintiff has attempted to make defendant responsible for his (plaintiff's) goods, destroyed by fire, on the ground that said defendant should have insured them as he had done his own.

There is no testimony showing that defendant had ever insured plaintiff's goods, nor that he had been instructed to do so. Defendant cannot be made liable. *Patterson v. Leake*, 5 A. 547; *Tonge v. Kennett*, 10 A. 800; *Gilly v. Berlin*, 12 A. 723.

We have carefully examined the testimony, and we think that the District judge came to a correct decision, and we adopt his judgment.

It is therefore ordered and decreed, that the judgment of the District court be affirmed, with costs.

HOWELL, J., recused.

CELESTINE DEJONA, f. w. c. v. STEAMBOAT OSCEOLA, CAPTAIN AND OWNERS.

A defendant must be sued at the place of his domicile, *in personam*, unless he voluntarily submits to the jurisdiction of the court where suit is brought against him.

The words of a law are to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words; and, where its expressions are dubious, its true meaning is to be discovered by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

The capacity of the plaintiff to stand in judgment must be pleaded in *hincius litis*.

A writ of provisional seizure will lie against a boat running exclusively within the State, for services rendered on board.

APPEAL from the Fifth District Court of New Orleans, *Eggleston, J. R. King Cutler for plaintiff*.—The plaintiff claims \$510 and interest, for services of her minor son, Constance, rendered to defendants. The judgment of the lower court is fully supported by the evidence and the law, and should be affirmed.

As to defendant's plea to the jurisdiction, see C. P. Art. 285, § 3, and Art. 289; 5 An. R. pp. 349 to 353.

Plaintiff's privilege: See C. C. 3204, par. 6, and Acts 1858, p. 111, § 1.

As to the pretended abandonment by plaintiff's son, see Acts 1858, pp. 142 and 143, § 2, and R. p. 19. The steward permitted him to go and see his mother.

R. & H. Marr for defendants and appellants.—Two things must concur to enable a sailor or other person employed on board a vessel to obtain the writ of provisional seizure. 1. He must have a privilege on the vessel. C. P. 284. 2. The vessel must trade within the State. C. P. 285, 289.

1. Privileges on ships and other vessels are prescribed by the lapse of six months. Act of 1858, p. 111. Five of the eleven months wages claimed were, therefore, prescribed, had ceased to operate as a privilege, at the time the suit was brought. The payments made on account are more than sufficient to extinguish the claim for wages earned in the State of Louisiana; and we respectfully submit that the lien established by the law of Louisiana has no extra-territorial effect, and cannot be extended to services rendered beyond the limits of the State.

2. But if there had existed a privilege in favor of plaintiff, the other indispensable requisite would still be wanting. This writ is the creature of the law, one of the harsh remedies, to be resorted to only in those cases in which it is expressly authorized, and which are determined, so far as ships and vessels are concerned, by Art. 289 of the Code of Practice. See *Smith v. Smith*, 2 A. 448; *Roquest v. Steamer B. E. Clark*, 12 A. 300.

Art. 289 contemplates two classes of vessels, those trading within the State, and those trading out of the State. The first clause of the article authorizes sailors and other persons employed on board vessels "trading within the State," to obtain this writ. The second clause authorizes the provisional seizure "even of ships trading out of the State," at the suit

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of those who have furnished materials or made repairs to such ships. Very clearly, therefore, these favored creditors, material men and those who have made repairs, may cause to be provisionally seized both classes of vessels; while sailors and others employed on board can demand the provisional seizure of such vessels only as fall within the description of vessels "trading within the State."

The legislature would not have provided a remedy against vessels which trade wholly without the State; for such vessels would not come within reach of the process of our courts, and could not be provisionally seized. The Article evidently intends to establish a distinction between two classes of vessels, both of which are subject to Louisiana process, and which must, therefore, come to ports in Louisiana. The first class is described as "trading out of the State," and the second class as "trading within the State." The first class is subjected to the writ of provisional seizure at the suit of sailors and others employed on board; while the second class is expressly exempted from such seizure.

It will not do to say that Art. 289 designed to exempt from provisional seizure, at the suit of the crew, merely such vessels as might accidentally be compelled to deviate from their voyages, and be forced into a Louisiana port for repairs, while endeavoring to prosecute their voyages in a trade wholly out of the State of Louisiana, and which did not require them to come within its limits. The object of the article is to authorize the seizure of a certain class of vessels, and to exempt another class from such seizure, at the suit of the crew. One of the requisites of every provisional seizure is, that the debt should be due and exigible. By the maritime law the sailor ships for the voyage; and he cannot claim wages, nor is anything due him for wages, until the voyage is completed. Vessels which are obliged to put into an intermediate port for repairs, have not completed their voyage; and are not liable to be sued by the crew. It would have been very idle, therefore, for the compilers of the Code to have established a distinction by which one class of vessels was subjected to the writ of provisional seizure at the suit of the crew, while another class was expressly exempted from such seizure, if this latter class comprised merely such vessels as accidentally might come into our ports for repairs, while prosecuting voyages wholly out of the State, both the *termini* of which were in other States, or in foreign countries. That no such idea entered into the minds of the compilers of the Code, or of the legislature, is sufficiently manifest, when we consider that they took care to allow the provisional seizure of such vessels as are subject to the writ, only for debts actually due; and that the wages of the crew of a vessel forced into an intermediate port for repairs, are not due. There could have been no motive for the express exemption of such vessels from seizure by the crew; because they are sufficiently exempted by the requirement that the debt for wages shall be due and exigible.

The terms "within" and "out of" are used as antitheses in Art. 289. "Within" means not beyond, and "out of" means beyond, the limits of the State. The first clause, therefore, restricts the right of provisional seizure to vessels trading not beyond the limits of the State, while the second clause extends the right in favor of two specified classes of creditors, even to vessels trading beyond the limits of the State.

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The one class of vessels has both the *termini* of its trade within the State, from one port in the State to another port in the State; and is, therefore, properly described as "trading within the State." The trade of such vessels is not merely in the State, but within the State, not beyond the State, wholly domestic; and such vessels only are embraced in the first clause of Art. 289.

The other class must necessarily have one *terminus* of its trade in this State, in order to be subject to Louisiana process. The other *terminus* is not in this State, but beyond its limits; and this class is properly described as "trading out of the State," from a port in this State to a port beyond the limits of this State. This constitutes the distinguishing feature of this class of vessels. They do not trade within the State, though they trade in the State; and this class alone is embraced in the second clause of Art. 289.

The Osceola, therefore, was a vessel trading out of the State, within the meaning and intentment of Art. 289. The proof shows that when she left New Orleans, on the day this boy shipped, she was bound on a voyage to a place out of the State. She went out of the State; she was regularly trading out of the State; and she was not, at the time the service of the boy commenced, nor at the time the writ was issued, subject to provisional seizure at the suit of any person employed on board.

The practical importance of this question must be our apology for discussing it at such length. It occurs almost daily in the inferior tribunals; and their decisions upon it are conflicting. This is the first instance in which it has been presented to this court, so far as we know; and we hope the court will now interpret Article 289 of the Code of Practice, and finally settle its meaning and extent.

HOWELL, J. Plaintiff instituted this suit in the Fifth District Court of New Orleans, to recover the sum of \$510, alleged to be due for the wages of her minor son, as cook on the steamboat Osceola, at the rate of thirty dollars per month, for two months from the 5th February, 1859, and fifty dollars per month for nine months thereafter. Upon the usual affidavit, the boat was provisionally seized.

The defendant, McMillan, as master and sole owner, excepted to the jurisdiction of the court, alleging his domicile to be in the parish of Caddo, in this State, which plea was, by consent, tried with the merits. He took a rule to set aside the provisional seizure, on the ground: 1. That the allegations in the petition and affidavit do not authorize the writ; and, 2. That the boat was, during the time for which wages are claimed, in a trade extending beyond the limits of this State, and, for the last nine months of said period, was not within the State. This rule was dismissed, and defendant filed an answer reserving his exception; pleaded the general denial; admitted that, on the 10th February, 1859, such a boy shipped on his boat at thirty dollars per month; set up, as a defence, the second ground of his rule; alleged a reduction in the wages; several payments on account; a deduction for lost time, and forfeiture of wages for abandonment before the completion of the last month; and denied the privilege.

Judgment was rendered in the lower court, dismissing the exception,

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and condemning the defendant to pay \$326 90, with interest, and privilege upon the boat; from which he appealed.

The first question presented is the plea to the jurisdiction. The defendant's residence is proven to be in the parish of Caddo; and, according to our jurisprudence and legislation, no personal judgment can be rendered against him, unless he voluntarily submit himself to the jurisdiction. Not having done so, the exception should be maintained, as to a judgment *in personam*. C. P. Art. 162 *et seq.* 5 A. 352.

He contends, in the second place, that his rule should be made absolute, because the character of the claim sued on does not authorize the writ of provisional seizure; and, consequently, no judgment can be rendered against the boat. In support of this position, and to take the case out of the ruling in *Henning v. Steamer St. Helena*, 5 A. 352, just quoted, he relies upon Article 289, C. P., in which, he says, a distinction is made between vessels trading "within the State" and those trading "out of the State." The first clause of the article gives to employees on vessels, *trading within the State*, as well as persons who have furnished materials for, or made repairs to such vessels, the right, when they bring their action against the captain, owner or consignee, to provisionally seize said vessels, to secure the amount of their claims, upon taking the prescribed oath. The second clause declares that "such seizure may be made even of vessels trading *out of the State*, at the suit of persons claiming payment for materials furnished for, or repairs made upon, such vessels." This clause gives to a class of creditors, embraced in the first clause, to wit: *those who furnish materials or make repairs*, a remedy against a description of vessels not included in the first, to wit: *vessels trading out of the State*. The first awards the writ to *both* classes of creditors against one description of vessels; the second gives it to *one* of those classes against an additional description of vessels.

We can find no case in which this point has been raised; but we believe that it has been the uniform practice, up to the present time, to grant the writ to the employees on all vessels where suits have been brought by them in the courts of the State for their wages; and we are now called upon to give a judicial interpretation to this Article of the Code of Practice.

Article 3204 C. C. establishes a privilege in favor of such creditors. Article 284 C. P. gives to them the right to provisionally seize vessels "navigating within the State;" and Article 289, same Code, points out the manner in which the writ may be obtained; and promises, further, that it may issue against vessels trading out of the State, at the suit of those who have furnished materials for or made repairs upon such vessels.

Had this not been added, we presume the question now before us would not be raised; and the enquiry is, does this clause restrict the former and limit the writ, so far as employees are concerned, to vessels which do not go beyond the borders of the State, and deny it in those cases where the vessels, though they may have their domicile here, extend their voyages or trade beyond the State limits?

It is a rule of interpretation that "the words of a law are to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular

use of the words (C. C. Art. 14) ; and where its expressions are dubious, its true meaning is to be discovered by considering the reason and spirit of it, or the cause which induced the legislature to enact it." C. C. Art. 18. Applying these rules to the article under consideration, we do not think it a forced construction to hold, that vessels, which have only one terminus of their voyage in the State, trade within the State, in the meaning of the law, and that the second clause of the article was added to provide for vessels which trade wholly out of the State—*les bâtimens qui font le commerce extérieur*—such as may come here simply for repairs; cases not provided for in the first part of the article. We can discover nothing in the reason or spirit of the law to justify the restricted meaning claimed for it by the appellant. By such a construction, our own citizens, trading entirely within the territorial limits of the State, might be placed in a less favorable position than those whose vessels trade beyond those limits, though it be but a few rods. The object of the legislature evidently was to give those who bring suit in our tribunals, for their wages, the right to seize, without having to furnish bond, the vessels on which they earned them; and the practice of years, without a doubt having heretofore been raised, has consecrated the meaning which we give to the terms of the law: a meaning which, we think, in no manner infringes the well settled doctrine, that this harsh remedy should be resorted to only in those cases in which it is expressly authorized.

In this view, then, we conclude that the rule was correctly dismissed; and that, under the decision in the case of *Henning v. Steamboat St. Helena*, this action was rightfully maintained as to the boat provisionally seized.

The capacity of the plaintiff was not excepted to in *limine litis*, and it is now too late to raise the objection. See authorities cited in 1 Hennen's Digest (2d ed.), p. 1152, b. No. 1.

On the merits, however, we think the lower court erred in the amount allowed. The claim embraces a period of eleven months, the wages for the last of which were forfeited, under the second section of the act of 1858, page 143, by abandonment before the end of the month; and the privilege is limited, by the act of the same year (p. 111, § 1), to six months. The wages are shown to be thirty dollars per month, which, for six months, amount to \$180; deduct from this the wages of the last month, and the payments made on account during the six months, amounting to \$103 10, and we have the sum of only \$56 90, for which a privilege exists by law.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed, and proceeding to give such judgment as should have been rendered below, it is ordered, adjudged and decreed, that the exception herein be sustained, so far as to dismiss the action *in personam* against W. McMillan, captain and owner of the steamboat Osceola; and it is further ordered, that plaintiff have judgment, with privilege, against the said steamboat Osceola, her tackle, apparel, etc., provisionally seized herein, for the sum of \$56 90, with legal interest from 10th January, 1860, until paid, without prejudice to the right of action, if any exist, for the wages not herein allowed, with privilege; the defendant to pay the costs of the lower court, and those of this court to be paid by the plaintiff and appellee.

THE STATE, ETC., on the relation of CHARLES E. ALTER, praying for a
Mandamus, v. THE JUDGE OF THE FOURTH DISTRICT COURT OF NEW
ORLEANS.

When a judge of an inferior court refuses to decide on the rights of litigants, this court cannot issue the mandate applied for to secure its appellate jurisdiction; nor when he decides adversely to the pretensions of a party. The reasons which he may give for his judgment cannot give this court original jurisdiction.

Our jurisdiction is only appellate, and we cannot correct, except on appeal, the judgments of other courts. Constitution, Art. 70.

The legislature has provided the manner by which an appeal may be taken. It is not by *mandamus*.

A PPEAL from the Fourth District Court of New Orleans, *Theard, J. Elmore and King for relator*.—This application is based upon the refusal of the District judge to allow the plaintiff to bond sequestered property, after the time allowed by law for the defendant to bond had expired.

The history of the case is briefly as follows :

A suit was instituted in the Fourth District court by *Moore & Browder for the use of Charles E. Alter v. J. B. Bres*. On this suit, sixty-four bales of cotton were sequestered. A motion was made by Moore & Browder, the nominal parties, to dismiss the suit, so far as they were concerned, alleging that a certain advantageous arrangement had been made by them with one Waltman.

Notice of this motion was given to Elmore & King, the counsel, who originally brought the suit and represented the interest of Alter. This motion was fixed for a hearing on Saturday, the 25th of November, 1865. On Friday, the 24th, the counsel for Alter moved the court for permission for Alter to bond the property sequestered. This order was granted, and Alter bonded the cotton.

On the opening of the court, on Saturday morning, the defendant, upon various grounds, stated in the record of appeal, in the case of *Moore & Browder, for the use of Alter v. Bres*, on file in the Supreme Court, moved the court to rescind the order of the day before granting to Alter the privilege of bonding the cotton.

The trial of this motion was suspended until after the other business of the court for the day was disposed of. In the meantime, the motion made by Moore & Browder was taken up and tried, and taken by the court under advisement. The motion to rescind the order to bond was then taken up; and, after argument on the part of plaintiff, the court ordered the previous order to bond to be rescinded, and ordered the sheriff to repossess himself of the cotton; which he did. To which the counsel for Alter objected, and took a bill of exceptions.

The court then proceeded to decide the motion made by Moore & Browder, and ordered the suit to be dismissed.

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Alter then applied for a suspensive appeal from both these decisions. The judge granted a suspensive appeal from the order dismissing the suit, but refused it upon the order rescinding the previous order to bond; stating for a reason, that he considered the appeal granted, as embracing both orders.

After these proceedings, the counsel for Alter made a new application to bond, which was refused by the court, upon the ground that an appeal had been granted by the court, and that the case was no longer within its jurisdiction or control. To which ruling of the court, the counsel for Alter excepted and tendered a bill of exceptions, which was signed.

In this ruling upon the last motion, we think the judgment of the court was clearly erroneous. The right of the plaintiff to bond was a right altogether disconnected with and independent of the merits of the case. He possessed this right from his position as a party litigant, and was entitled to exercise it, even if it were morally certain that he would eventually be cast in the suit. Suppose that, on the very day a suit was brought and property sequestered, the defendant, confident of his case, went to trial, and judgment was rendered against him, from which he took a suspensive appeal; can any one doubt that he might still exercise his privilege of bonding?

The detention of the property necessarily caused by the appeal might, in such a case, be the very motive for bonding it.

If, in the case supposed, the defendant would have the right to bond, it is equally clear that the plaintiff would have the same right, after the lapse of ten days. There is no limit fixed by the law within which the application to bond must be made. After the lapse of ten days the right of the plaintiff to bond becomes absolute, and exists so long as the suit lasts, if there be a necessity for its exercise.

The right of a party in a sequestration to bond is strongly analogous to the similar right in cases of attachment.

The defendant may, in every stage of the suit, have the attachment set aside, by giving bond as required by law. C. P. Art. 259.

The plaintiff, in a sequestration case, has the same right, after the ten days have elapsed.

The effect of the suspensive appeal, in this case, was to place parties in the situation they were before the judgment was rendered. As the plaintiff had the right to bond before the judgment, he had the same right after the appeal.

These positions are sustained by authority. In the case of *Sighers v. Antheman*, 1 N. S. p. 74, it was held that: "Pending an appeal from a judgment revoking the power of an attorney for absent heirs, his power is retained." The court says: "The propriety of this revocation is now before us in another case; and, we are of opinion, cannot be examined in this, until a decision be given confirming the judgment of the court of the first instance, the attorney stands here with all the powers originally conferred on him."

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JUDGE 4th D. C. "Plaintiff in injunction is entitled to the protection of the court, so long as the matter in controversy is undetermined; and a suspensive appeal from a judgment, dissolving the injunction with damages, has the effect of maintaining the case in the position it was in before such judgment." *State ex. rel. Walden v. Judge*, 19 L. R. 167; *City Bank v. Walden*, 1 R. R. 181.

"A creditor's right to exercise any legal remedy for the recovery of his debt cannot be considered as suspended by an appeal on a matter purely incidental and not inconsistent with the remedy he seeks to enforce; so an appeal from the dissolution of an injunction against executory process for want of notice of seizure and proper advertisement will not prevent the creditor from returning the process and proceeding under an alias writ." *Wright v. Rousselle*, 6 A. R. 73.

An appeal presents no obstacle to the determination of questions arising subsequent to such appeal. *State v. Hamel*, 6 A. R. 257.

Upon these authorities we say that, as the right of the plaintiff to bond the property was independent of the merits of the case; and, as the suspensive appeal from the judgment dismissing the suit placed parties *statu quo*, an application to bond, made after the appeal, could not be refused on account of that appeal. The very fact of the appeal and the length of time the property would be held by the sheriff made the plaintiff the more desirous of exercising his legal right. The right to bond was a conservatory act, rendered more necessary by the appeal. As we could not appeal from the refusal of the judge to allow us to bond; or, even if we could, the delay would destroy the value of the right to bond, no other relief was left to us but to apply for a *mandamus*.

We consider the refusal of the judge to allow us to retain the property we had bonded under his order, and his subsequent rescinding that order and directing the sheriff to retake the property, as equally erroneous and detrimental to the plaintiff's rights. The judge considers that matter before the Supreme Court on the appeal. How could it be, when the record shows that he ordered the sheriff to take immediate possession of the property, and that the order was executed. After this, it was idle to tell us, he would grant a suspension appeal. A suspension appeal from what? What was suspended by the appeal?

Not the order directing the sheriff to retake the property, for that order had already been executed. He grants us a suspension appeal from a judgment after that judgment had already been executed, somewhat analogous to the proceeding of granting a new trial after the convict had been hung. It is true the propriety of his orders may be inquired into on the appeal on the merits of the case; but this affords us no adequate relief for his refusal to allow us the exercise of a plain legal right, and delaying us until the right became worthless; especially when this is done upon grounds wholly illegal and erroneous.

The reason assigned by the judge for rescinding the order to bond, was that the order was granted during the pendency of the motion made by Moore & Browder, the nominal plaintiffs.

That motion was not, as the judge erroneously supposed, a motion to dismiss the suit, but merely to dismiss it, so far as they were concerned, without prejudice to Alter's rights.

Now, as the nominal plaintiff had no concern or interest in the suit, the granting of their motion could not have affected the suit. Our objections to the motion were, that it seemed to imply a right on the part of the nominal plaintiffs to interfere with the prosecution of the suit, and the granting of it might have been supposed to have produced the necessity of changing the title of the suit. This could not have been done without producing great confusion in the docket.

In our answer to the motion, we denied the right of the nominal plaintiffs to make any such motion, or to interfere in any manner with the suit. But as it was apparent the nominal plaintiffs had no interest in the suit, we had no objection to an entry to that effect being made upon the minutes. We contend that the pendency of such a motion formed no barrier to the plaintiff's exercising his legal right to bond. It certainly did not prevent the defendant from bonding. He was not even notified of the motion.

If it be said that the defendant was deceived by the motion and lulled into a false security, thinking there was no necessity for his bonding; we reply that "*ignorantia legis neminem excusat.*" He is presumed to have known that the nominal plaintiff had no right to make the motion, or even if it had been granted in the very terms used, it would not have interfered with the rights of Alter, the real plaintiff. The nominal plaintiffs never had the right to bond the property sequestered for themselves. Their motion to dismiss the suit so far as they were concerned, could not be considered, therefore, as a waiver of the right of Alter. There was nothing in the motion which, by any kind of implication, could impair Alter's right to bond, or which interfered in any manner with the defendant's exercising that right, if he had chosen so to do. It would be monstrous, if a party, who upon the face of the papers had no interest, or right to interfere with the suit, could upon his mere motion deprive the plaintiff of the exercise of his plain legal rights! It would be still more deplorable, if this mere nominal party was instigated and hired by the defendant to make the attempt thus to interfere in the suit, and to take advantage of his own wrong. Moore & Browder acknowledge in their motion, that they make it because Waltman, the owner of the cotton, had made an arrangement with them to dismiss the suit. We therefore conclude that the motion of Moore & Browder, the nominal parties, to dismiss the suit so far as they were concerned, without prejudice to the rights of Alter, the real plaintiff, form no bar to Alter's bonding the property, and that the order of the court rescinding the previous order to bond was illegal and unauthorized.

From this statement of the case, as it appears from the record, it is difficult to divine the considerations that influenced the court. The solution will probably be found in his subsequent judgment dismissing the suit altogether.

It will be seen that the judge did not confine himself to the motion made, which was to dismiss the suit so far only as Moore & Browder were concerned, "without prejudice to the right of C. E. Alter to prosecute his demand as he may deem fit," but dismissed the suit altogether. No reason is assigned in the record by the judge for this extraordinary decision. He stated orally that he considered Moore & Browder had the

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STATE right to dismiss the suit. In this decision the authorities show he was
JUDGE 4th D. C. altogether mistaken. *Suits for use, &c.*

"But courts of equity have long since totally disregarded this nicety. They accordingly give effect to assignments of trusts, and possibilities of trusts, and contingent interests, whether they are in real or in personal estate, as well as to assignments of *choses in action*.

Every such assignment is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession." 2 Story's Eq. p. 305, sec. 1040. See also marginal references.

The practice in courts of equity was derived from the civil law, and assimilates very nearly to our own.

Our own courts have accordingly held similar and stronger doctrines in reference to such actions.

"In a suit by A, for the use of B, the latter is the real plaintiff, of whom the court and the defendant are bound to take notice." Herman's Digest, p. 1124, sec. 6. Also *Davis et al. v. Taylor*, 4 N. S. 135. The very language adopted in the above principle is extracted from this decision.

The case of *McNair v. Thompson*, 5 M. R. 561, was a suit by Fowler for the use of McNair, on a contract of affreightment made by Fowler with Thompson. The Supreme Court in deciding the cause say: "Thus, if McNair should come forward, without the assistance of Fowler, he would be without any right. But Fowler's declaration that he sues for the use of McNair, amounts to a relinquishment and transfer of his own right in his favor, and is considered as sufficient to enable McNair to appear in this case as the real plaintiff."

Dicks et al. v. O'Connor, 5 M. R. 549.—If the nominal plaintiffs had an absolute right to compel payment, it is immaterial whether it is exerted in their own right and for their own use, or in their own right for the use of their transferee.

Filhiol v. Jones et al, 8 M. R. 635. The court held: "Suit may be brought on a note not negotiable in the name of the payee for the use of the transferee."

Dayton v. Commercial Bank, 6 R. R. 17. "In an action by one for the use of another, the latter is the real plaintiff."

Rawle, for the use of Russel, v. Skipworth et rex, 19 L. R. 210. "The plaintiff, by bringing suit on the assignment and claiming the benefit of it, has ratified and confirmed the condition on which it was made." * * "The legal title is in Rawle, and he may sue for the use of whom he pleases."

In the suit before the court, the action was brought for the use of Alter; judgment was asked for the use of Alter. The action was brought to enforce the specific performance of a contract between Moore & Browder and one Waltman. Prior to the filing the suit, this right of action existed in Moore & Browder. The filing of the suit for the use of Alter was a complete transfer and assignment to him of all the rights of Moore & Browder in the contract and in the suit. The appearance of Alter in the suit was an acceptance and ratification of the transfer of all the rights of Moore & Browder. This transfer carried with it the right to prosecute

the suit as it then stood, and to continue the use of the name of the transferres, who became mere nominal parties. The moment the suit was filed, the rights of Moore & Browder ceased, and those of Alter took their place, just as *la mort saisit le vif*. This transfer, on the part of Moore & Browder, could not be revoked by them in any of its parts. The consent to use their name could not be recalled. Alter incurred expenses and responsibilities upon the faith of the transfer, and acquired rights of which he could not be divested by Moore & Browder.

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Where suits are transferred after the action has been brought, the suit is still prosecuted by the original title, although the nominal plaintiff, as a matter of record, has no interest in the suit. A change of title would involve the records of the court in inextricable confusion. It should never be allowed by the courts.

The foregoing principles of law, governing actions by one for the use of another, have been so long recognized, and so often applied, that it is not without surprise that we are called upon, in this case, to make an argument to show that Alter is the real plaintiff, and as such had the sole right to exercise the rights of plaintiff. Now, if Alter was the plaintiff, his first motion to bond the property was the exercise of his undoubted right.

The order rescinding the previous order to bond was illegal and unauthorized. The delay caused by an appeal will destroy the value of this legal right to bond. Is the plaintiff to be denied the exercise of his legal right, because a judge will perversely insist that he is not the plaintiff, when the record shows that he is? Are we to have forced upon us a party as plaintiff, when the record shows on its face that the party is not the plaintiff? Are we to be told that a judge, by closing his eyes to all the lights of reason and of law, can make the fictitious control the true, the nominal the real, the shadow the substance, and thereby deprive a party of his unquestionable legal rights; and that there is no remedy but one, which is so slow in its operation as to defeat and destroy the value of the right?

We humbly submit that this cannot be in a land where law and justice are administered.

We think the party is entitled to a *mandamus*, compelling the judge to allow him to exercise his right to bond, on either of his applications for that purpose. Let us inquire in what cases will a *mandamus* be granted.

Mandamus.—"The object of this order is to prevent a denial of justice,

* * and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse of whatever nature." C. P. Art. 830.

"This order may be issued at the discretion of the judge, even when a party has other means of relief; if the slowness of ordinary legal forms is likely to procure such a delay that the public good and the administration of justice will suffer from it."

A *mandamus* will be granted to compel a district judge to sign a bill of exceptions. C. P. Art. 900.

STATE Also to compel a probate judge to entertain an application to appoint
JUDGE 4th D. C. an under tutor and convoke a family meeting. 14 L. R. 483. 7 A. R.
184.

So to compel the judge to act when delay would produce injury and injustice. 4 R. R. 48.

So even in matters of discretion, where there is a clear abuse of discretion, tending manifestly to thwart justice and frustrate the right of appeal. 7 A. R. 126,

Also to compel a judge to try a cause. 4 R. R. 227.

Also to compel a judge to grant an appeal. 3 M. R. 184.

Also to compel the issuance of execution in certain cases. 11 L. R. 368.

Also to comply with mandate of the Supreme Court. 6 R. R. 92.

Also to prevent unreasonable delay. 13 A. R. 481.

The right of a plaintiff to bond sequestered property, after ten days have elapsed, and the defendant has made no application to bond, is fully guaranteed by the law. R. S. p. 95, § 13.

The court has no discretion to refuse him this privilege, and might as well debar him from the right of appeal, or any other right secured to a party litigant.

The plaintiff is denied the exercise of this clear legal right, over which the district judge has no discretion. The delay of an appeal is as fatal to him as the absolute denial of the right. This is precisely the case for a *mandamus*, pointed out by the articles of the Code of Practice, above quoted.

The theory of the judge is, that Moore & Browder are the plaintiffs who have the control of the suit. That Alter has no rights as plaintiff, not even to bond the cotton. Upon this theory, Alter is compelled to abide the action of Moore & Browder, and can do nothing without them or contrary to their wishes. If the judge had carried out his theory, he should have refused the appeal he granted to Alter. Suppose he had done so, could any one doubt that, on an application for a *mandamus*, the Supreme Court would have compelled him to have allowed an appeal to Alter? The right of Alter, as plaintiff, to bond the cotton is equally as clear as his right to appeal in the supposed case; and he is as justly entitled to a *mandamus*.

We ask for a *mandamus* upon both the grounds stated in this brief. 1. On his refusal to grant the last application to bond, which is, perhaps, the clearest one. 2. Upon his refusal to allow us to hold the property under the first order and the bond given.

The *mandamus*, we think, may justly be awarded to us on either ground.

HYMAN, C. J. The relator complains that the judge had, by an order, rescinded a prior order of his court, granting to him, relator, permission to bond the cotton sequestered in the case of *Moore & Browder for the use of C. E. Alter v. J. B. Bres*, and had moreover directed the sheriff to take possession of the cotton after he (relator) had bonded it; and that, subsequent thereto, the judge had refused, on a motion made by relator, permission for him to bond it.

The relator applies for a writ of *mandamus* to compel the judge to permit him to bond the cotton.

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When a judge of an inferior court refuses to decide on the rights of litigants, this court cannot issue the mandate applied for to secure its appellate jurisdiction; nor when he decides adversely to the pretensions of a party. The reasons which he may give for his judgment cannot give this court original jurisdiction.

Our jurisdiction is only appellate, and we cannot correct, except on appeal, the judgments of other courts. Const. Art. 70.

The legislature has provided the manner by which an appeal may be taken. It is not by *mandamus*.

Mandamus refused.

WIDOW BETAT et al. v. E. E. MOUGIN.

Legal presumption is that which is attached, by a special law, to certain acts or to certain facts; such as the weight which the law attaches to the confession of the party, or to his oath.

A PPEAL from the Second District Court of New Orleans, *Whitaker, J. J. Magne* for plaintiffs. *C. Roselius* for defendant and appellant.

LSLEY, J. The late widow Betat (of whom the plaintiffs are the legal representatives) and the defendant, E. E. Mougins, were co-partners.

The sum claimed in the petition, seven hundred and ninety-one dollars and seventy cents, is represented to be the balance by him the defendant due, in cash, in the settlement of the partnership; besides an amount of three thousand eight hundred and twenty-eight dollars and ninety-two cents, assets to be divided.

The defendant, by his answer, acknowledged himself indebted to the plaintiffs in the sum of six hundred and eighty-nine dollars and seventy-four cents; but he averred that one hundred and eighty-two dollars and forty-six cents were due to him, and he prayed that that sum should be allowed him in compensation, or deduction.

The court below gave judgment in favor of the plaintiffs for six hundred and forty-two dollars and seventy-three cents, subject to a credit of sixty-eight dollars, allowed in compensation, and ordered the partition of the three thousand eight hundred and twenty-eight dollars and ninety-two cents; and from this judgment the defendant, Mougins, has appealed.

The plaintiffs in this court pray that the judgment of the District court be amended, by striking out the item of sixty-eight dollars, improperly allowed to the defendant and appellant; and that judgment be rendered by this court in accordance with their prayer.

By the answer of the defendant, it is admitted that he is indebted to the plaintiffs in the sum of six hundred and eighty-nine dollars and seventy-four cents; and this judicial confession is conclusive as regards that item. See Art. 2264 L. C.

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We find no evidence whatever in the record to sustain the defendant's plea in compensation. He annexed an account of indebtedness on the part of the plaintiffs to him, but he totally failed to prove it.

The plaintiffs and appellees do not complain of the judgment allowing them only the sum of six hundred and forty-two dollars and seventy-three cents; but say that the sum of sixty-eight dollars was erroneously allowed to defendant, and they pray accordingly.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be so amended as to strike out and disallow the sum of sixty-eight dollars, awarded by the said decree to the defendant by way of compensation; and that, so amended, the judgment be and is hereby affirmed, with costs in both courts, to be paid by the defendant and appellant, E. E. Mougin.

MEDINA & CLOHECY v. JOHN HANSON.

Carriers or watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events.

A PPEAL from the Second Judicial District Court of the Parish of Jefferson, *Cazabal, J.*

N. Commandeur for defendant.

R. King Cutler for plaintiffs and appellants.—Plaintiffs claim four hundred and eleven dollars damages, caused by the carelessness and negligence of the defendant, as a common carrier, by taking into his charge and towing, with his steam job-boat *Downs*, a lot of ship timber from Battle Ground Flats, below the city, to Algiers. The defendant, after denying the allegations of plaintiffs' petition, claims in reconvention the sum of five hundred dollars, for four days loss of time of his boat and crew, and the loss of rope, and the sustenance of the crew. The judgment of the court *a quo* was in favor of defendant and against plaintiff, for thirty-four dollars, on the plea in reconvention.

The first question presented by the facts of this case is, whether the defendant was a common carrier. By reference to 1 La. Rep. p. 350, in the case of *Smith v. Pearce*, we find "that the owners of steam towboats are liable as common carriers;" and that the court were unanimously of the opinion "that the situation of proprietors of towboats, and the business they undertake, cannot legally authorize a relaxation of the severity and rigor of the rules applicable to common carriers." This opinion is confirmed in the case of *Davis v. Houren*, in 6 Rob. Rep. p. 255; and again in the case of *Millaudon v. Martin*, 6 Rob. p. 534. In fact, the elementary law is clear upon this question: for, it would seem, that the only interpretation that could be given to Articles from 2722 to 2726 of the Civil Code, is, that owners of steam towboats are liable as common carriers. These authorities clearly establishing the liability of the owners

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of steam tow boats as common carriers, we will next consider their liability. By reference to Jones on Bailments, Appendix, pp. 17, 18, 19 and 20, we find: "By the custom of the realm, a carrier is responsible for events which are independent of his contract, and is liable for losses, whether arising from accident, robbery, irresistible force, or any other means whatever, except they arise from the act of God or from the king's enemies." "A carrier is in the nature of an insurer, and is liable for every accident, except by the act of God or the king's enemies." "The act of God means something in opposition to the act of man, for everything is the act of God that happens by his permission, everything by his knowledge." "But to prevent litigation, collusion and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man." As to whom the burthen of proof rests upon, the same authority continues thus: "If a loss happens, the *onus probandi* lies on the carrier to exempt him from liability; and it is not enough for him to prove where the goods are carried by water, that the navigation is attended with so much danger that a loss may happen, notwithstanding the utmost endeavors of the watermen and crew to prevent it; that the person conducting the boat possesses competent skill and due diligence, and provided hands of sufficient strength and experience to assist him." We find this doctrine laid down in the Civil Code, Arts. 2722 to 2726, inclusive, and sanctioned by this court in the case of *Holland v. Cammett*, in 5 An. p. 705, as well as in numerous other decisions which we deem it unnecessary to refer to.

The testimony of John McBride, that of T. R. Brady, Captain John H. Brown, Captain Jacob Joachim, as well, in fact, as the principal witnesses on the part of the defence, thoroughly and clearly proves and establishes the contract between the plaintiff and defendant; and that defendant was to carry, or tow, with his steam towboat Downs, the ship timber, mentioned in the plaintiffs' petition, from the Battle Ground Flats, eight or ten miles below the city of New Orleans, to Algiers, the place of its destination; and further, that the defendant went with his tow boat Downs to the Battle Ground Flats, where the timber was situated, and there took possession of it, fastened it to his boat, commenced the carrying of it by loading a part of it into an empty flatboat, brought there for that purpose by the defendant, with his towboat Downs. The same witnesses establish that the same evening on which they commenced the loading of the timber, more particularly about bedtime of that night, the weather was clear and calm, although it had been blowing quite hard a day or two previous, and did blow very hard a few days afterwards. That, during the night, a wind arose, and the steamboat, flatboat and timber, all got adrift in the Mississippi river; and the ship timber, staples, ropes, etc., mentioned in plaintiffs' petition, were entirely lost. Further, the same testimony proves conclusively that John Hanson, the defendant, who was the owner of the boat, and who then acted as commander and captain, he having the entire control, was, and he is, a very incompetent boatman; and, further, that the boats and timber were improperly moored and fastened, they being tied to old

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drift logs on the shore, with old and unsound ropes, which leads us to the irresistible conclusion that there was no one on watch that night, and that the loss happened in consequence of the reckless carelessness, imprudence, want of skill and mismanagement on the part of the defendant, and that the loss cannot be attributed to an act of God. The testimony introduced by the defendant is an attempt, first, to discredit some of the witnesses of plaintiffs'; second, to establish that the river at the Battle Ground Flats was difficult of navigation; and, thirdly, that Captain Hanson did all he could to save the timber.

According to the principles heretofore laid down, from Jones on Bailments and the decisions of this court, even if the defendant had succeeded in establishing his second and third grounds of defence, it could have availed him nothing as a defence to this suit; for we contend that it was incumbent on him, not to prove that he acted with due diligence and as a prudent master of a vessel would act under similar circumstances, but it was his imperative duty to show that the loss occurred from an overpowering act of God. The error fallen into by the learned judge below, was in considering his second ground of defence a bar to this action; for, in his reasons for judgment, he says: "That Captain John Hanson, the defendant, seems to have taken all the precaution for the safety of his towboat, as well as of plaintiffs' timber and flatboat, and that the accident by which some of the timber was lost cannot be attributed to him;" which clearly shows that to him it was sufficient for the defendant to establish due diligence on his part, and that it was not necessary for the defendant to prove that the loss occurred from an act of God; which opinion, as is apparent, conflicts with the law and settled jurisprudence of this State. Admitting the foregoing facts, all of which are fully presented by the testimony in the record, nothing can be more certain than that the defendant is legally liable to plaintiff for the value of his property lost on this occasion. The Civil Code alone fixes his liability. Article 2723 reads: "They are answerable, not only for what they have actually received in their vessels, but also for what has been delivered to them at the port or place of deposit, to be placed in the vessel or carriage." Again, Article 2725, reads: "Carriers and watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accident and uncontrollable events." These articles have been frequently considered by this court, and it may be correctly said that the question is no longer an open one, for the uniform jurisprudence of the State, as settled by this court, is "that the common carrier, under the commercial law, is answerable for all losses that do not fall within the excepted cases of the act of God," (perils of the seas.) Among other authorities on this subject, we refer your honors to the case of *Thomas v. Ship Morning Glory*, 13 An. p. 269; the case of *Logan v. The Pontchartrain Railroad Company*, 11 Rob. p. 24; and to the case of *Rochereau & Co. v. Barque Hansa*, 14 An. p. 431.

LABAUVE, J. The plaintiffs and appellants claim of the defendant the sum of \$411, with interest. They allege, in substance, that in January, 1860, they had contracted to deliver to James Martin, at the Atlantic dry dock, at Algiers, a certain quantity of white oak (ship timber), from

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thirty-five to forty pieces ; of which twenty-one pieces were then some eight miles below Algiers, lying in the Mississippi river ; that said Hanson agreed to tow the said twenty-one pieces of timber from where they were to said dry dock, and proceeded down the river with his job-boat Downs, to where the timber was, but concluded that said timber could not be towed up then, in the condition it was then in ; and petitioners purchased a flatboat, which they delivered to said Hanson to convey the said timber ; that said Hanson went back and commenced placing in said flatboat the said timber ; and, having put in seven pieces, night came, and the labor was suspended until next morning ; but, that said Hanson fastened the boat in so bad a manner that she broke loose in the night and floated down, with said flatboat and timber attached to her, and that the fourteen pieces, which had not been put in said flatboat, were lost ; that this loss was caused by the carelessness and negligence of said Hanson, etc., and he prays accordingly.

The defendant answered by a general denial, but admitted the undertaking ; denied, at the same time, the neglect imputed to him ; that the loss was caused by an unforeseen storm. He claims in reconvention \$500, for which he prays judgment.

The District court dismissed plaintiffs' demand, and gave judgment for defendant in reconvention, for \$34 and costs.

We find in the record a bill of exceptions, taken by plaintiffs ; but, as a decision upon it would not change the conclusion we have come to, we have not thought necessary to pass upon it.

The testimony shows that the weather was fine in the commencement of the night ; that the steamboat had two anchors out (one at each end), and a line ashore, tied to an old log ; there was nothing else to tie it to. The flatboat was properly fastened. In the night a storm came on ; everything got loose—steamboat, flatboat and timber. The timbers that were not put on the flatboat were lost.

It is true that steamboats are common carriers, and, as such, are held to the most strict vigilance and responsibility. They must deliver what they have received, unless they prove that the loss has been occasioned by *accidental and uncontrollable events*. C. C. Art. 2725.

The loss of the timber is proven, as alleged ; it was then incumbent on the defendant to show the accidental and uncontrollable event which had caused the loss. He has done so by proving a storm which put everything adrift in the river. But it is contended that he had been neglectful in not securing properly his steamboat, the flatboat and the timber. We have carefully examined the testimony, and we think, with the district judge, that the defendant is not responsible. We are of opinion that the judgment appealed from is erroneous in allowing the defendant thirty-four dollars in reconvention against the plaintiff. We believe that defendant has failed to make out his demand in reconvention.

It is therefore ordered and decreed, that the judgment of the District court be annulled and avoided ; it is further ordered and decreed, that there be judgment against plaintiff, and that there be also a judgment against the defendant on his reconventional demand. It is further ordered and decreed, that plaintiff pay costs incurred in the District court, and that the defendant pay those of appeal.

N. C. BRIGGS v. J. S. SIMONDS.

The neglect or failure of one party to prove what is essential to his recovery, is not cured by the evidence of the other, leaving the fact doubtful.

APPEAL from the Fourth District Court of New Orleans, *Price, J.*
Hunton & Miller for plaintiff. *G. A. Breau* and *Dirhammer* for defendant and appellant.

HOWELL, J. This is an action to recover back the sum of \$476 34, the amount of an execution against plaintiff and in favor of defendant, as having been paid in error.

A general denial was pleaded, and judgment rendered against defendant for \$433 44, with interest, from which he appealed.

The facts are as follows:

In the year 1856 Simonds had a claim for \$401, for repairs to the steamboat *C. Hays*, for which the plaintiff, as captain, gave his due bill on 29th December, 1859, endorsing on it, at the time, an acknowledgement or confession of judgment, in these words: "I hereby acknowledge the above bill or note to be correct, and also judgment on the same. Dec. 29, 1856. (Signed) N. C. Briggs, master steamboat *C. Hays*."

In the spring of 1857, Dr. Crockett transferred to Simonds a note of Goodall for about \$350, endorsed by him, Crockett; on which Simonds brought suit on 28th May, 1857, took judgment, and, by his attorneys, received on 18th November, 1857, from Crockett, the endorser, \$358 10, in full satisfaction thereof.

On 8th June, 1857, Simonds sued on the note or due bill given by Briggs for the repairs to the steamboat *C. Hays*, and on the same day, by virtue of the confession thereon, as above, took a personal judgment against Briggs; on which no proceedings were taken, until February, 1859, when execution was issued and levied on the steamboat *Bluff City*, the property of Briggs, as she was about leaving the port of New Orleans; and Kennett, Blood & Co., as the agents of Briggs, paid off said execution, amounting to \$476 34, on 25th February, 1859, being the sum claimed in this suit.

The plaintiff alleged that Dr. Crockett was the owner of the steamboat *C. Hays*, and that the transfer by him of the Goodall note for \$350 was in payment of the repairs, for which the plaintiff had given his due bill. The burden rests upon him to show that both payments were made on the same account, to wit: for the repairs of the boat.

There is no proof in the record that Crockett was owner of, or in any way connected with the steamboat; and the only direct evidence, in relation to the object of the transfer of the Goodall note to defendant, is the testimony of the witness *Muckison*. But he appears to have derived his knowledge of this important fact from Crockett himself, a third person, not interested in the suit; which is clearly hearsay evidence, and not admissible. 8 N. S. 671. The fact that the latter was dead at the time of taking the testimony does not change its character. It was excepted to by the counsel for the defendant, and the exception must prevail.

Independent of this testimony, the record does not contain sufficient proof to support plaintiff's demand. The neglect or failure of one party to prove what is essential to his recovery is not cured by the evidence of the other, leaving the fact doubtful. 3 N. S. 228.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; and it is further ordered, that judgment be rendered in favor of defendant, with costs in both courts.

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CATHARINE MCGUIRE, Tutrix, v. KEARNY, BLOIS & Co.

The rule of law is *caveat emptor*; and, where a party purchases an article, on inspection, he can not afterwards complain of the consequences of his own act.

A PPEAL from the Third District Court of New Orleans, *Handlin, J.*
Jacob Barker for plaintiff.

Geo. L. Bright for defendants and appellants.—This is a suit to recover \$1,160 20, the balance of the price of oakum sold by Philip McGuire to defendants.

The defendants admit they made the purchase, but allege that, on a previous occasion, they purchased from McGuire a lot of oakum, and when McGuire sold them the oakum, the subject of this suit, he represented it to be of the same quality as that which had been previously bought from him by defendants. They contend that whether or not the representation of McGuire be proved, the law implies a promise or undertaking from him that all goods manufactured and sold by him for a specific purpose, and to be used in a particular way, are reasonably fit and proper for the purpose for which he professes to make them, and for which they are known to be required; and they allege that the oakum delivered by him was unmerchantable and unfit for use.

The representations of McGuire are established by the witness, *John Murphy*. He says "he is the warehouseman of the defendants; he recollects a lot of oakum bought by defendants from Philip McGuire. It was sent to the warehouse without any person knowing anything about it. It was sent to Kearny, Blois & Co.'s warehouse. McGuire sent it there as being equal to a lot previously sold by him to Kearny, Blois & Co. The way I knew it, was a communication between the warehouseman, Wm. Clooney (now dead), and Philip McGuire, or his clerk; I can't say which. The communication was in writing."

This evidence was received without objection from plaintiff. The loss of the written communication is established by the affidavit of Mr. Kearny, which was also admitted without objection.

The facts established by Murphy are supported by the warehouseman's receipt, offered in evidence by plaintiff. It is signed Kearny, Blois & Co., per William, *i. e.*, William Clooney. Dyer, McGuire's clerk and agent, says McGuire had sold better oakum to Kearny before; that the oakum (the subject of this suit) was of a very poor quality; would not call it

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oakum, but oakum stock; does not recollect whether Kearny asked him whether it was the same kind of oakum as that which he had previously purchased.

The court will remember that this is the person who made the sale to defendants, and he does not remember whether he made to them any representations at the time of sale. It appears by his evidence that the oakum was unfit for use, and if he made no representation, he must have concealed the true character of the oakum and deceived the defendants.

By the civil law there is an implied warranty in every sale. If the seller knows of a defect in his goods, which the buyer does not know, and if he had known would not have bought the goods, and the seller is silent, his silence is, nevertheless, a moral and legal fraud, and ought to avoid the transaction.

In the case of *Hill v. Gray*, 1 Stark. 434, a picture was sold, which the buyer believed had been the property of Sir Felix Agar, a circumstance which might have enhanced its value in his eyes. The seller knew that the purchaser was laboring under this delusion, but did not remove it, and it did not appear that he either induced or strengthened it. In an action for the price, Lord Ellenborough nonsuited the plaintiff, saying the picture was sold under a deception. See Parsons on Contracts, pp. 460, 461. At common law the rule of *caveat emptor* applies, and the party buys at his peril. 2 Kent, p. 478. With regard to the quality or goodness of the article sold, the seller is not bound to answer, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation or used some fraudulent concealment concerning them, and which amounts to a warranty in law. 2 Kent, 478. But, in Louisiana, the rule of the civil law is different; and, as a general rule, a sale for a sound price is understood to imply a warranty of soundness against all faults and defects. 2 Kent, 480, 481; 1 Martin R. 1.

In *Hosmer v. Bear & Fox*, 5 An. 36, the plaintiff argued the corn was sold as being damaged and of inferior quality, because it was sold for 63 cents per bushel, when prime corn was selling at 75 cents. The court said, this may show that the corn was not a prime lot, but the defendants were not to infer from the price paid that it was damaged.

The general rule is, the rule of morality, that prohibits every concealment of facts that should be disclosed to the buyer, and every false representation. The exception made by Article 2497, C. C., is not really an exception to the rule, and is unnecessary. That Article provides that "apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices," for, if the defect is apparent, it is disclosed. It only means that where the article is susceptible of convenient examination, the purchaser is bound to make and abide it.

In *Rouzel v. McFarland*, 8 Martin, 704, the plaintiff sold to defendant a boat. Shortly after, defendant loaded her and set off for Natchitoches, but on the way she was found to be very leaky; and, on examination, proved to be so rotten that one of the witnesses says he could run his finger into the timber in many places. Mr. McFarland's defence was

that the defects were apparent, and that, in the bill of sale, Rouzel says that he has seen and visited the boat. The court said: but it was his duty to declare them; and that he knew them is proved by the evidence.

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In *Williams v. Miller et al.*, 9 La. 134, the court said: The buyers, in the present instance, were deceived by the representations of the quality of the articles sold by the vendor; and whether they were thus deceived by error or design on his part, cannot vary the right of the parties *in foro leges*, because the defects were not discoverable immediately on inspection; and they were such that it must be supposed that the buyers would not have purchased had they known them. The articles sold were logs.

In *Melançon v. Robichaux*, 17 La. 98, it appears that the action was brought to annul the sale of a flatboat fitted up to be used as a ball room, on the ground that, at or before the time of sale, it had defects known to defendant, which he fraudulently concealed from the plaintiff. It appeared that, before purchasing, plaintiff examined the boat and expressed himself satisfied with its condition; and that, even after the sale, he appeared to consider his bargain a good one. The court says: "It is clear, from the whole evidence, that the flatboats leaked in such a manner as to make its use as a ball room so inconvenient and imperfect that the plaintiff would not have purchased had he known this defect to exist. We cannot doubt that the defendant knew this defect; but, even if he did not, yet he could be bound to restore the price." See, also, 3 An. 4.

The plaintiff argues that the defendants had full opportunity "to examine the whole, whether they examined it or not. If they had an opportunity of doing so, and neglected it, they are barred from all claims." This is not law. If it were, commerce would lead to most dishonest practices. The rule would be, cheat if you can, whereas the law prescribes good faith and honesty in all transactions, and will not permit one man to enrich himself unjustly out of his neighbor. It implies, as we said in the opening of this argument, a promise or undertaking from him who sells, that all goods manufactured and sold by him for a specific purpose, and to be used in a particular way, are reasonably fit and proper for the purpose for which he professes to make them, and for which they are known to be required. 1 Parsons on Contracts, p. 469. The rule *careat venditor* governs. See notes to 2 Kent, 480.

The oakum, in this case, was manufactured by the plaintiff. *Dyer*, plaintiff's witness, agent and vendor in this case, says: "It was a very poor quality." * * * "We did not make good oakum at the factory."

* * "I would call it oakum stock." * * "Oakum stock is the rope untwisted and picked without going through the gin. I have never seen oakum of such a low quality as that." *Murphy* says: "It was not oakum at all. It was pieces of rope cut, not spun, only picked by hand; it was not oakum fit for use; it could not be sold." *Anderson*, ship carpenter, says: "It would cost too much to pick it; it might be worth two or three cents; it was the sweepings of the place." *Connor*, ship carpenter, says: "It was not worth drayage." * * * It is called shakings." *Larkey* says: "It was not worth anything to him; it was part oakum, balance shakings, mostly dirt. It is called shakings, picked up; what was good for nothing, the good oakum having been picked out of it."

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The plaintiff endeavors to avoid the fraud practiced upon defendants, by asserting the defendants examined the oakum before making the purchase. The only evidence on this point is that of plaintiff's agent, *Dyer*; he says: "Mr. Kearny did not make much of an examination of the oakum; he pulled out a handful here and there, out of the bales. He did not open any bale. The bales were piled up eight or ten on top of each other, and it was impossible to make a thorough examination."

In *Harmony v. Wayer*, New York Supreme Court, quoted in note to 2 Kent, 661, it was held that, as the defendant had not an opportunity to examine the bulk of the article sold, he was entitled to expect a merchantable article.

In *Millaudon v. Price et al.*, 3 An. p. 1, the court said: "We do not consider that salt is an article which is susceptible of inspection or examination, as to its condition, without much trouble or inconvenience, and the vendor is bound to good faith; and, if he knows the article to be defective, he is bound to state the defects."

In *Richard & Alfred v. Edward Burke*, 7 An. 242, the court said: "The Article of the Code relied upon relates to such defects as are apparent to the senses, without opening boxes, barrels or packages to discover them by examination, and not to those which are concealed without this examination."

HOWELL, J. This suit was brought to recover the balance due on the sale of a lot of oakum, sold to defendants on 15th March, 1862.

The defence is that the article sold was represented to be similar to a lot previously bought by them from the same vendor, but that, on examination, it proved to be altogether inferior and wholly unmerchantable.

The evidence does not make out the defence.

It is shown that defendants saw the oakum several days before purchasing, and examined some of the bales or packages; and it is not proven that the interior was different from the exterior of the packages. At the time of the sale, it was known by defendants to be all of a "low quality." One of them contended that it ought to be sold lower, "owing to its inferior quality."

We see no reason for disagreeing with the judge who tried the cause in the lower court.

It is therefore ordered that the judgment be affirmed, with costs.

BOWER & GARNER v. F. FRINDELL and Wife.

The acknowledgment of a debt by the wife, without his express authority, will not bind the husband, unless she herself is a public merchant; nor can she bind herself for his debt by such an acknowledgment.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J.*
Geo. L. Bright for plaintiffs and appellants. *C. Dufour* for defendants.

HYMAN, C. J. Plaintiffs sued defendants on an open account.

The defendants are husband and wife. There is no evidence to prove the account, but the acknowledgment of the wife. Fred Frindell was conducting business in his own name, and his wife assisted him. She signed for him some receipts in his name, but she did not carry on a separate trade from her husband; nor did she do any acts in connection with his business in her own name. She was not a public merchant; and, without being so, she could not acknowledge a debt without the authority of her husband, neither could she bind herself for the debts of her husband, though contracted during marriage and while the community existed. There is no proof that she was authorized by her husband to acknowledge the debt for him. Such authority must be express and special. See Civil Code, 2966.

The judge of the district court rendered a judgment of nonsuit against plaintiffs. We see no cause to change it.

Judgment affirmed.

C. A. FASSEY v. THE CITY OF NEW ORLEANS.

When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply those principles to determine what ought to be the incidents to a contract, which are required by equity.

A PPEAL from the Sixth District Court of New Orleans, *Duplantier, J.*
Durant & Hornor for plaintiff. *Thos. H. Hewes* for defendant and appellant.

ILLSLEY, J. The plaintiff was one of the city assessors in the year 1862, under and in conformity with the amended city charter, approved by the Legislature on the 20th March, 1856.

The duties devolving on assessors are clearly defined by the charter, and the compensation was, by Article 87, to be fixed by the common council.

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What compensation was so fixed by the council is not shown in the record; but it is proved that, had all the services which devolved on the plaintiff as assessor, been performed, or he was legally dispensed from completing them, the amount stated by him in his bill (two thousand six hundred and sixty-two dollars and thirty cents) would have been the correct sum, and that there would have been still due to him the balance claimed, of nine hundred and eighty-four dollars and sixty-eight cents.

The city pleaded the general issue, without setting up any special defence.

Judgment was rendered by the court below, in favor of plaintiff, for the whole amount claimed, and from this judgment the city has appealed.

By the said charter, the assessors were to act in three ways: 1. As assessors *simply*. See section 77. 2. As members of the board of assessors (§ 43); and, 3. As members of the board of supervisors of assessment, § 25.

Each assessor acted separately and alone for his assessment district, until his assessment roll was completed, when it was to be submitted to the board of assessors, to adopt, alter or correct it. §§ 75, 76.

On or before the 15th August of each year, it was the duty of the assessors to make fair copies of their assessment rolls, and leave them with the secretary of the board, and to give notice, in the official journal of the common council, of their having completed such assessment. § 77. By section 78, public notice, to the inhabitants or owners of property, was to be given, that the assessment rolls were deposited at a certain place for inspection, and that the assessors would meet at a certain day, at the expiration of the thirty days, and at a place to be specified in the notice, to receive assessments, on the application of any person conceiving himself aggrieved. By section 81, the assessment rolls were to be certified in the manner thereby required; and, by section 90, the board of supervisors of assessments were annually, on the *first Monday of October*, to meet for the purpose of examining the several assessment rolls transmitted to them, and equalize and correct the valuations made therein, in accordance with the said section; and, by section 89, a forfeit of one thousand dollars was to be incurred by any supervisor of assessment who neglected, or for any cause omitted to perform his duties.

Whatever services were performed by the plaintiff, and they seem to have consisted of making his out-door assessment, and the preparing his tax roll, and his presumed attendance at the meetings of the board of assessors, which were held in July, 1862, the plaintiff was removed from his office by the military authorities, some time in August, 1862; and, although all the functions of his office for that year were not, necessarily, then fully performed, as his services were needed as a member of the board of supervisors of assessments, which only commenced in October, the most arduous duty, to wit: the out-door assessment and his tax roll, had been then completed, awaiting only the action of the board of supervisors; which board, however, afterwards approved his assessment roll, and the taxes in his district were collected under it.

During the year 1862, the city being in the possession of the United States military authorities, and its municipal affairs under their exclusive

control, the plaintiff was removed by them from his office, and a new incumbent was put by them in his place, which was a measure provided for in case of a vacancy occurring by *death, removal, resignation or otherwise*. See section 86.

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Conceding that the amount for the whole services be correctly stated at \$2,662 30, the question is here presented, whether, under all the circumstances, he can lawfully demand a larger amount than that which has already been paid to him? Whether the removal was properly made or not, is immaterial. It suffices that it was made by the military authorities, who recognized no other than military or martial law, and they controlled the situation, absolutely. An examination, therefore, of the plaintiff's bill of exceptions becomes unnecessary. The removal of the plaintiff from his office was *his* misfortune; and, if it entailed on him a loss, his, unfortunately, was not an exceptional case.

Such other duties remained to be performed by the plaintiff, were fulfilled by his successor, who was paid for his services; but how much he was paid therefor we are not informed.

If the work, actually performed by the plaintiff, exceeded in value what he has received, the city would be, in equity, bound to pay him the surplus; but, what that excess would amount to, is not disclosed by the record.

Were it not fair to presume that the account rendered by him in 1863, and then paid to him, was the only one that would have been sanctioned at that time, we should have deemed his claiming then nothing more than his own estimate of the value of his services, and that his present demand was an after-thought; but, as it is, we think the ruling of the court in the case of *Lambert v. King*, 12 A. 662, should prevail, and that he might well invoke Article 1960 of the Louisiana Code. We shall, therefore, only dismiss his motion, as in case of non-suit.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided, annulled and reversed.

It is further ordered, adjudged and decreed, that the plaintiff's action be dismissed, and that he pay the costs in both courts.

SUCCESSION OF CONSTANCE PERRET.

When the creditors of a succession, or an insolvent estate, who have an important interest in maintaining a judgment, have not been cited, nor their citation asked for by appellant, the appeal will be dismissed.

APPEAL from the Fourth District Court of the Parish of St. Charles, *Beauvais, J.*

A. Voorhies & A. Derbes for appellant. *A. Lavison & R. K. Culler* for opponents.

HOWELL, J. A motion is made to dismiss this appeal on the grounds, first, that all the parties interested are not cited on appeal; and, secondly, that the petition of appeal is vague and indefinite.

The appellant contends that it is sufficient to cite the administrator, who represents all the creditors on the tableau, the judgment amending and homologating, which is appealed from; and that, if such is not the case, the defect, omission or irregularity, can be now remedied, and the requisite citations issued and served before the cause will come up on its merits.

If the irregularity is not imputable to the appellant, it can be remedied under the provisions of the act of 1839, p. 170, § 19, re-enacted in 1864. See Session Acts p. 22, § 12. But we find that the appellant prayed only that the administrator be cited; and it is not required of the clerk, in such contingency, to issue citations to others. He has done all that the appellant has demanded; and it is not a case in which to apply the equitable provisions of the foregoing law and the authorities cited.

When the creditors of a succession, or an insolvent estate, who have an important interest in maintaining a judgment, have not been cited, nor their citation asked for by appellant, the appeal will be dismissed. 8 An. 57, 367; 12 An. 765; 13 An. 231. The creditors, whose claims were opposed by the appellant, have not been cited, nor has their citation been asked for. They clearly have an interest in the judgment appealed from.

It is therefore ordered that the rule be made absolute, and that the appeal be dismissed at the costs of appellant.

JULES LEVOIS v. JAMES GALE, Captain, and owners of Ship R. D. Shepherd.

The shipper is not bound to disclose the value of the goods, unless asked; but the carrier has the right to inquire, and to have a true answer; and, if deceived, he will not be responsible. If he make no inquiry and no artifice mislead him, he will be responsible for any loss, however great the value of the articles.

APPEAL from the Sixth District Court of New Orleans, *Leaumont, J.*
George L. Bright and J. W. Gurley for defendants and appellants.

J. L. Tissot for plaintiff.—The laws of the port of shipment, not of destination, govern a contract of affreightment. *Hampton v. Thaddeus, 4 M.*

584; Hennen's Digest, 1423, No. 1; Felix, Droit International, privé, vol. 1, Nos. 96 et 210.

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Connaissance, C. Com. Art. 222. Le capitaine est responsable des marchandises dont il se charge.

Il en fournit une reconnaissance. Cette reconnaissance se nomme connaissance. Ord. 1681, liv. 2, tit. 1, art. 9; C. N. 1782, 1783; C. Com. 281, 293, 420.

Responsabilité, Pardessus, droit commercial, Com. 2, p. 364, No. 541.

Le voiturier doit remettre les objets qu'on lui a confiés à celui de qui il les a reçus, ou à celui qui lui a été indiqué par l'expéditeur, etc.

Lorsqu'il ne remet pas les choses qui lui ont été confiées, il doit les payer, au prix qu'elles valaient au moment où la remise a dû s'exécuter, etc. No. 542.

Le voiturier doit veiller à la conservation des marchandises pendant le voyage, et les rendre dans le même état qu'il les a reçues. C. N. 1782, 1915.

Sa responsabilité commence à l'instant même où elles ont été remises à lui ou à l'un de ses préposés, soit sur le port, soit dans quelque local public dont la surveillance n'appartient ni à l'expéditeur, ni à des personnes dont il répondent. C. N. 1783. Cassation, 19 mars, 1814. C. voyez aussi No. 495; C. N. 1782.

Les voituriers par terre et par eau sont assujettis pour la garde et la conservation des choses qui leur sont confiées, aux mêmes obligations que les aubergistes, dont il est parlé au titre du dépôt et sequestre. L. 1, in pr., 1, 2, 3, 4; C. 1952, 2102, 6, Com. 101, 103, 222; C. pén. 386—4,475—3,476.

C. N. 1983. Ils répondent non seulement de ce qu'ils ont déjà reçu dans leur bâtiment ou voiture, mais encore de ce qui leur a été remis sur le port ou dans l'entrepôt pour être placé dans leur bâtiment ou voiture. C. 1382; C. com. 97, 103.

Boulay Paty, Com. 1, p. 406.

Si le capitaine ne représente pas toutes les marchandises portées au connaissance, il est tenu de payer la valeur de celles non représentées, au prix du lieu de décharge, (market value). Argument tiré de l'article 134 du code de commerce.

Le capitaine est responsable des marchandises et effets des voyageurs qu'il prend à son bord, moyennant un salaire convenu. 7 fév. 1829 Bied-filles; Journal du Palais, 22, 661.

Code de commerce "Du capitaine."

Le capitaine est garant de ses fautes même légères. C. Com. Art. 216, 293, 405, 407, 435, 438.

Il est responsable des marchandises dont il est chargé, Art. 222.

Il en fournit une reconnaissance qui en est la preuve. Art. 281, 293, 420.

Gouget et Mergé, droit commercial, Tom. 2, No. 97.

Le capitaine est tenu d'opérer ou de surveiller le chargement, etc. Les affréteurs ou chargeurs mettent seulement les marchandises sur le quai à la disposition du capitaine.

No. 112. Il opère les acquits de paiement ou à caution des douanes, c'est-à-dire les expéditions constatant soit l'acquittement préalable des

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droits de sortie, soit les garanties moyennant lesquelles la sortie est accordée sans paiement des droits. V. acquit à caution, douanes.

Encyclopédie du droit obligations du capitaine. Tom. 3, p. 383, N. 148, 149, No. 151.

Il est mandataire responsable.

No. 152, déchargement; 156, 157, 158, 164, doit rendre les marchandises telles qu'il les a reçues.

Répertoire du Journal du Palais, vol. 1, p. 819, No. 425, 449, 459, 484, 512, tenu de payer les marchandises perdues.

Granveaux, transports, responsabilité du transport des marchandises, p. 597, No. 12, 13, 14, 15, 18, 23, 24.

Dépôt et séquestre, mêmes obligations.

Troplong, No. 2, commentaire sur C. N. Art. 192, p. 49, No. 64, 65.

C. C. Art. 2722. Carriers and watermen are subject, with respect to the safe keeping and preservation of the things intrusted to them, to the same obligations and duties, which are imposed on tavern-keepers in the title of deposit and sequestration.

Hennen's Digest, p. 1475. Ship owners and masters are liable for the whole loss suffered in consequence of non-delivery of the cargo at the place of destination. 1 Mar. p. 39.

They are accountable for the value which will be fairly estimated at the invoice price. 2 N. S. 236.

C. C. 2723. They are answerable, not only for what they have actually received in their vessel or vehicle, but also for what has been delivered to them at the port or place of deposit, to be placed in the vessel or carriage.

C. C. Art. 2725. Carriers and watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events.

Hennen's Digest, p. 1425, No. 11. Though a bill of lading acknowledging the goods to be in good order, be open to examination, still its recital cannot be overthrown nor qualified, except by very clear evidence; it cannot be weakened by a conjectured showing. The policy of the law holds the carrier to a very strict accountability. 6 An. 801; 8 An. 292, p. 1426.

No. 2. The master is liable for *levissime culpa*. 11 Martin, 598; 6 An. 410.

No. 6. Where notice that a ship would not be responsible for jewelry, unless the value were disclosed, is brought home to plaintiff, who, without disclosing the nature or value of articles, intentionally ships them so as to conceal their real character, the owners are not liable. 9 R. 468.

No. 7. Publication of a notice in one or more newspapers, no matter for how long a time, open intention to be responsible for particular articles, unless their contents and value be disclosed, will not release the carrier. The notice must be brought home to the shipper. 9 R. 468.

Hennen's Digest, p. 1426. Where there is no notice or rule, the better opinion seems to be that one sending goods is not bound to disclose their value, unless asked; but the carrier has the right to inquire and to have a true answer; and, if deceived, will not be responsible. If he make no

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inquiry, and no artifice mislead him, he will be responsible for any loss, however great the value of the articles. 9 R. 468.

In cases of common carriers, where there is no notice, the better opinion seems to be, that the party who sends the goods is not bound to disclose their value, unless he is asked. But the carrier has the right to make the inquiry and to have a true answer, and if he is deceived, and a false answer given, he will not be responsible for any loss. If he makes no inquiry, and no artifice is made use of to mislead him, then he is responsible for any loss, however great the value may be. Story's Commentaries on the law of Bailments, § 567; 2 Kent, p. 597, § 40, and the authorities cited by these two eminent authors.

LABAUVE, J. The plaintiff alleges that, on the 19th August, 1859, in Havre, he shipped, and the captain received, on board of said ship, a package, marked T. L. No. 18, containing "watches, music boxes, and articles of jewelry," of the value of \$2,415 17; that the ship failed to deliver said package to the consignee, in New Orleans, according to the bill of lading. He prays that the defendants be decreed to pay, *in solido*, for the non-delivery of said box, the sum of \$2,415 17.

Defendants answered by a general denial; they further answered, that the box was described in the bill of lading as a package of merchandize, to induce defendants to believe that the box contained merchandize of but little value, and to avoid the payment of freight according to its value, etc.

The District court rendered a judgment for \$2,415 17 in favor of plaintiff and against defendants, *in solido*.

The defendants took this appeal.

The following words close the bill of lading: "Dated in Havre, the 19th August, 1859. Contents unknown to. Signed, James Gale."

The defendants contend, in argument, that, as the box contained watches, music boxes, and articles of jewelry, the plaintiff was bound to disclose that fact; and, having failed to do so, the defendants are not responsible.

The rule seems to be settled that the shipper is not bound to disclose the value of the goods, unless asked; but the carrier has the right to inquire and to have a true answer; and, if deceived, he will not be responsible. If he make no inquiry, and no artifice mislead him, he will be responsible for any loss, however great the value of the article. *Baldwin v. Collins*, 9 Rob. 468.

Nothing shows that the captain made any inquiry; he took, then, upon himself the whole responsibility of delivering the articles so shipped, according to his contract, or to show that he was prevented from doing so by *accidental and uncontrollable events*. C. C. Art. 2725. The bill of lading and the admissions show clearly that the captain received the box and its contents; and the testimony, which is very long, and which we have carefully examined, has failed to prove, even by presumptions, that he had delivered said box; it was incumbent on defendants to make out a clear case in their defence. They have failed to do so.

Judgment affirmed, with costs.

J. R. TERRY v. C. W. STAUFFER.

The writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office in a *corporation*, inquiring by what authority he claims or holds such office. Art. 488, C. P. This mandate is only issued for the decision of disputes between parties, in relation to the offices in *corporations*, as when a person usurps the character of *mayor of a city*, and such like.

With regard to offices of a public nature, that is, which are conferred in the name of the State, by the Governor, with or without the consent of the Senate, the usurpations of them are prevented and punished in the manner directed by the penal code.

A *mandamus* is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act, belonging to the place, duty, or quality with which it is clothed.

An injunction is said to be a mandate obtained by plaintiff, prohibiting one from doing an act which he contends, may be *injurious* to him, or *impair* a right which he claims. C. P. Art. 286. It is a conservative act, an equitable remedy, which a party may obtain provisionally, on bringing his action. C. P. Art. 288. And, in order to obtain it, the party applying for the same, must state, under oath, the facts which, according to his belief, render an injunction necessary.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J.*
John Henderson for plaintiff and appellant.—J. R. Terry, as plaintiff, presented his petition to the Third District Court of New Orleans, setting forth the following facts:

That, whilst in the lawful possession and enjoyment of the office of register of voters, in and for the parish of Orleans, he was forcibly dispossessed of said office by C. W. Stauffer, defendant herein, under the pretext that he was lawfully removed therefrom, and the said Stauffer duly commissioned therefor by the governor of the State of Louisiana; that he was rightfully in possession and had a right to continue therein until the expiration of his term of office, to wit: 4th Monday in January, 1868, and to the enjoyment of the salary thereof, to wit: the sum of five thousand dollars per annum, according to law, unless sooner removed or suspended in the mode and manner prescribed by law; that he never has been legally suspended for any act of commission or omission in violation of his duties in the said office, nor has he ever been prosecuted by the attorney-general of the State for any malfeasance or misfeasance in office, as prescribed by law; that said Stauffer is a usurper of said office to the manifest prejudice and injury of him (Terry); that the commission issued to said Stauffer by the governor of the State, was without authority of law, therefore, null and void; that he (Terry) being the rightful person to enjoy said office, its privileges and emoluments, during the term of office as aforesaid, should be retained in the possession thereof; and, if illegally dispossessed (as in truth he has been), he should be instantly restored to the full enjoyment thereof, without hindrance or delay arising from the trespass and usurpation of the said C. W. Stauffer; that the ordinary remedy prescribed by law is too tardy to secure justice to him, and would work an irreparable injury to him; that said Stauffer show cause why the remedial and conservative writs of *quo warranto*, *mandamus* and injunction should not issue; the latter, upon Terry's exe-

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ention of a bond, with good and sufficient security, conditioned as prescribed by law, in favor of said Stauffer; and a special prayer that said Terry be decreed to the rightful and full possession of the office of register of voters for the parish of Orleans; that he be restored to the possession thereof by said Stauffer, as well as to all the papers thereto appertaining; that said Stauffer be ordered to pay said Terry so much of the salary of said office as he may deprive him of during the pendency of this action; that said Stauffer be enjoined from acting as register of voters aforesaid, and that Terry be decreed to resume the duties of said office without further delay; and, finally a general prayer for relief in the premises.

To this petition is annexed the affidavit of Terry, that all the statements and allegations therein contained are true. On this sworn petition, Terry took a rule on Stauffer to show cause why the writs therein prayed for should not issue upon the usual conditions.

To this rule the said Stauffer filed the following exceptions:

1. That the above petition discloses no cause of action, defendant not being a municipal officer, but an officer created by the State, and duly commissioned by the governor thereof, cannot be reached by a *quo warranto*.

2. That, being an officer of State, a writ of *mandamus* can only issue to compel the defendant to perform some duty devolving on him from the very nature of his office. The plaintiff's proceedings disclose no such state of facts.

3. That the writ of injunction is a specific writ for certain cases designated by law, and that the case at bar is not within those so designated.

4. That said writs applied for can only issue in the name of the State, while the present suit is simply *J. R. Terry v. C. W. Stauffer*, and not in the name of the State.

After the trial and argument of this rule and exceptions, the court refused all of these writs, from which interlocutory judgment of the court, a suspensive appeal was taken. In support of this ruling of the court, the following written reasons were assigned:

"A rule is taken by plaintiff on defendant to show cause why writs of *quo warranto*, *mandamus* and injunction should not issue for the restitution of the plaintiff to the office of register of voters, and the return of the records thereof. Defendant pleads by exception that plaintiff's petition discloses no cause of action to warrant the issuance of the writs prayed for. The writ of *quo warranto* is defined by Art. 867, C. P., to be an order rendered in the name of the State by a competent court, and directed to a person who claims or usurps an office in a corporation, inquiring by what authority he claims or holds such office. This mandate is only issued for the decision of disputes between parties in relation to the offices in corporations, as when a person usurps the character of a mayor of a city, and such like. With regard to offices of a public nature, that is, which are conferred in the name of the State by the governor, with or without the consent of the senate, the usurpations of them are prevented, etc." Art. 868.

"The office of register of voters is created by act of 1856, section 1, which gives to the governor the appointing power by and with the advice

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of the senate. It is not, therefore, an office in any corporation; hence, the relief sought by the plaintiff cannot be obtained by the writ of *quo warranto*. The writ of *mandamus* is directed to an individual to perform some certain act belonging to the place, duty and quality with which it is clothed. Art. 829 C. P.

"The plaintiff does not ask that defendant be compelled to fulfill any of the duties appertaining to the office of register of voters, but, on the contrary, that he be prevented from performing them any longer."

"With regard to the injunction, I am of the opinion that the case is not one of those in which this writ is authorized by law. Plaintiff's rights are fully protected on the merits. For the reasons assigned, the writs applied for by plaintiff must be refused. Let the rule be discharged."

From this interlocutory order a suspensive appeal was taken.

We contend in this court that appellant was rightfully entitled to either of said writs, if not to all at the same time.

Suppose the appellant had, in the usual form, filed his petition for an injunction with the usual affidavit and bond, and had obtained an order from the court *ex parte* for a writ of injunction, and after due notice of such injunction the defendant, Stauffer, had on rule applied for its dissolution upon the face of the papers, can there be a reasonable doubt in the legal mind of this court, that the original court should have overruled the motion to dissolve?

The reverse of this proposition is equally true, that is, it would have been manifest error in the lower court to have denied either or all of said writs, upon the sworn case made by appellant.

That a writ of injunction was a proper writ upon the case exhibited by plaintiff, we cite the following law, C. P. Art. 303:

"Besides the cases above mentioned, courts of justice may grant injunctions in all other cases when it is necessary to prevent one of the parties during the continuance of a suit from doing some act injurious to the other party."

Injunction, or prohibition, is a mandate obtained from a court by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him, or impair a right which he claims. C. P. Art. 296; 7 Rob. 445. In 14 An. 8, the court say: "The occupation of pilot for the port of New Orleans is lucrative, and is restricted by law to the persons specially designated by the governor of the State. It is therefore evident, that the exercise of this business by a person not legally appointed, may be prejudicial to each and every one so appointed. The petition, therefore, discloses a sufficient cause for action. 12 An. 480, 5 Rob. 367, 378.

The writ of *mandamus* should have issued. C. P. 829-832; 1 Rob. 474, 492-496, 506; 6 An. 68; 11 An. 141, 672, 693; 13 An. 289, 401-459; 12 An. 719; 4 N. S. 525; 13 L. R. 562.

The writ of *quo warranto* should have issued. 5 M. R. 271; 1 An. 163; 10 An. 420; 14 An. 505.

The general rule prescribed by law is, that the old incumbent shall continue to discharge the duties of his office until his successor is elected, commissioned and qualified, and no longer. 11 An. 293; Constant Art. 125, Act 1825 ss. 2, p. 350; 10 An, 293; 5 An. 282-536.

The governor cannot create a vacancy. 9 An. 238; 5 Rob. 367; 8 An. 295; 11 An. 486.

The commission of the executive without the authority of law is void. 14 An. 8; 5 Rob. 367.

Offices in this State are derived either from the people at the ballot box, or from the executive, under the appointing power. When derived from the ballot box, the commission of the executive is only nominal and mere evidence of title; but when originating with the governor, by virtue of the law, then the commission furnishes the right as well as the proof of title to an office. An office, by the vote of the people, can only be contested in the mode and manner prescribed by law. 5 An. 291; 12 An. 129, 366; 12 An. 719; 13 An. 89, 175, 301; 14 An. 505.

In a controversy between an incumbent and his successor, where both claim exclusively under the executive commission, the incumbent may show that the commission to his successor is void, as the governor issued it without the authority of law. 14 An. 8.

The appellee relied on act 1856, ss. 12, 13, p. 134, as authorizing the executive to remove the incumbent of the registry of voters, and appoint another at the pleasure of his excellency. True it is, the law, under certain circumstances, authorizes the governor to remove, but what circumstances, and how made known to the governor?

Articles 12 and 13 have to be construed together.

Section 12 authorizes the attorney general to sue the defaulting register of voters, setting forth the nature of the charge, etc. Convicted, the officer shall forfeit his salary or fees of office, or so much thereof, according to the gravity of his act of commission or omission, as shall be decided in the suit **** but said register shall have the right of appeal to the Supreme Court, and, in the meantime, the governor may suspend him from his functions, and appoint a substitute, who shall thereby assume all the powers and incur all the responsibilities of the suspended register.

Then follows section 13, which declares, "That should the gravity of the violation of the spirit and intention of the provisions of this act, in the opinion of the executive of the State, warrant the removal of such a register, he shall appoint a successor to serve out the unexpired term of four years, and such a successor, or any subsequent successors shall be liable to the same suspension or removal, at the pleasure of the executive; and the said executive shall, however, assign his reasons therefor to the senate, at the first meeting of the legislature thereafter."

Appellant contends that the meaning of these two sections taken together is simply this:

That after trial and conviction, and pending the appeal, the executive may suspend or remove. The executive is the judge as to the gravity of the charge upon which the register has been convicted.

The appellee contended, in the original court, and as he will in this, that the gravity of the violation of the spirit and intention of the provisions of the law regulating the duties of register, is a matter of inquiry to be made by the executive, *dehors* judicial proceedings, based on a charge, trial and conviction.

If this view of the law be correct, then appellant confesses he has no

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farther claims to said office. But, strange to say, no such defence was plead in the defence of this action. Defendants simply plead that he was lawfully in office as register of voters, under a legal commission from the governor of the State.

Miles Taylor and J. H. Van Dalsen for defendant.—The plaintiff alleges that he was illegally removed from the office of register of voters for the parish of Orleans, and that the defendant and appellee was illegally appointed by the governor in his place; and he asked, in his petition, that the defendant show cause why the remedial and conservative remedies of *mandamus*, *quo warranto* and *injunction* should not issue against said Stauffer, the incumbent; and that, after due proceedings, why the defendant should not be removed and himself reinstated in said office.

A rule issued to defendant to show cause, as first stated, and to that rule the defendant excepted, as follows :

1. That the plaintiff's proceeding discloses no cause for action or complaint, the defendant being *not* a municipal officer, but an officer created by the State and duly commissioned by the governor, cannot be reached by a writ of *quo warranto*.

2. That, being an officer of the State, a writ of *mandamus* can only issue against the defendant to compel him to perform some duty devolving on him from the very nature of his office; and the plaintiff's proceeding discloses no such state of facts.

3. That the writ of *injunction* is a specific writ, for certain cases designated by law, and that the case at bar is not within the cases so designated.

4. That the writs applied for can only issue in the name of the State, while the present suit is simply by *J. R. Terry v. C. W. Stauffer*, and *not* in the name of the State.

The court *a quo* sustained the defendant's exceptions, and refused the writs prayed for, and the plaintiff appealed.

LABAUVE, J. J. R. Terry, the relator, states that, on or about the 10th June, 1865, he was in the lawful possession and enjoyment of the office of register of voters for the parish of Orleans, and that he was forcibly dispossessed by C. W. Stauffer, under the pretext that he, said Terry, was legally removed therefrom, and the said Stauffer duly commissioned therefor, by the Governor. The relator states that he is entitled to the said office, claims to be put in possession, and the said Stauffer ordered to deliver said office. He prays that said C. W. Stauffer do show cause why the remedial and conservative writs of *mandamus*, *quo warranto* and *injunction* should not issue.

The defendant answered as follows, by way of exceptions :

1. That the plaintiff's proceeding discloses no cause of action or complaint, the defendant not being a municipal officer, but an officer created by the State, and duly commissioned by the Governor, cannot be reached by a *quo warranto*.

2. That, being an officer of the State, a writ of *mandamus* can only issue against the defendant to compel him to perform some duty devolving on

him from the very nature of his office; the plaintiff's proceedings disclose no such state of facts.

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3. That the writ of injunction is a specific writ, for certain cases designated by law, and that the case at bar is not within those designated.

4. That the writs applied for can only issue in the name of the State, while the present suit is simply by *J. R. Terry v. C. W. Stauffer*, and not in the name of the State.

And should these exceptions be overruled, then the defendant pleads a general denial, and avers that he is legally appointed register of voters for the city of New Orleans, etc.

He concludes by praying that the rule may be set aside, and that plaintiff pay costs.

The court sustained the exceptions, and the relator took this appeal.

1. This is not a case for the writ of *quo warranto*, upon the face of the petition. According to Art. 867 C. P., the writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office in a *corporation*, inquiring by what authority he claims or holds such office. Art. 868, C. P. This mandate is only issued for the decision of disputes between parties, in relation to the offices in *corporations*, as when a person usurps the character of *mayor of a city*, and such like.

With regard to offices of a public nature, that is, which are conferred in the name of the State, by the Governor, with or without the consent of the Senate, the usurpations of them are prevented and punished in the manner directed by the penal code.

Article 869 C. P. A mandate to prevent the usurpation of an office in a *city* or other *corporation*, may be obtained by any person applying for it.

The Article 870 C. P. provides that the court, after having declared the party not qualified, shall direct the corporation to proceed to a new appointment.

The office of register of voters is created by the act of 1856, section 1, which gives the Governor the appointing power, by and with the advice of the senate; therefore, it is clear that the register of voters is a State officer, and not such an officer as contemplated by the provisions of the articles above quoted.

2. The petition does not show that the relator is entitled to the writ of *mandamus*, which, according to Art. 829 C. P. is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual or corporation, or court of inferior jurisdiction, directing it to perform some certain act, belonging to the place, duty, or quality with which it is clothed.

The relator does not ask that the defendant be directed to do some certain act; but he demands, on the contrary, that he be forbidden to perform the functions of his office as Register of voters.

3. The injunction prayed for presents some more serious difficulties.

An injunction is said to be a mandate obtained by plaintiff, prohibiting one from doing an act which, he contends, may be *injurious* to him, or *impair* a right which he claims. C. P. Art. 296. It is a conservatory

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act—an equitable remedy—which a party may obtain provisionally, on bringing his action (C. P. Art. 208); and, in order to obtain it, the party applying for the same must *state under oath the facts which, according to his belief, render an injunction necessary*. C. P. Art. 304. The judge must look to the facts alleged and sworn to, and, in the exercise of his judgment, see if the facts are sufficient to require his interference to prevent an injury to the applicant, or an act that might impair his right. The judge below said: “With regard to the injunction, I am of opinion that this case is not one of those in which the writ is authorized by law.” We are not prepared to say that our learned brother erred. The defendant is exercising the functions of register of voters in and for the parish of Orleans; he is, under the law, a State officer. The relator claims the office, and, at the same time, prays that, during the pendency of this suit, the said C. W. Stauffer be enjoined from acting as register of voters, as aforesaid; but we see in his petition no facts sworn to, going to show that he would suffer an injury, or that his right would be impaired, by said Stauffer continuing to exercise his official functions pending the writ. It should require the strongest showing, on the part of a private individual, to induce a judge to enjoin a State officer from performing his functions; and we are not prepared to say that it can be done in any circumstance. The effects of such injunction would reflect upon and affect materially the government, and might stop, in certain cases, the governmental machinery.

We are of opinion that the District judge did not err.
The judgment appealed from is affirmed, with costs.

ROBERT MOORE v. CITY OF NEW ORLEANS.

All agreements relative to personal property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved by at least one credible witness, and other corroborating circumstances.

APPEAL from the Sixth District Court of New Orleans, *Duplantier, J. Durant & Hornor for plaintiff*.—So far as plaintiff is concerned, Cook & Brother were in possession, as owners, of the coal at the date of our purchase. We bought and paid, and received possession of the coal, without any knowledge of any hidden equities between the city and Cook & Brother. Indeed, these equities are not shown by the record, directly or indirectly; whether Cook & Brother owes the city, or the city owes them, is equally in doubt. For these secret equities, the plaintiff, whose good faith is not impugned, must not be permitted to suffer. This rule

applies equally to movables as well as immovables. Story's Equity, sec. 1503. *Fullerton v. Kennedy*, 6 An. 315, and cases therein cited. *Tatum v. Wright*, 7 An. 358. MOORE
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Miles Taylor and Thos. H. Hewes for defendant and appellant.—I. The evidence in this case shows, that the coal which is the subject of the suit, was bought by the city at an expense of \$6,200, and was placed in the yard near the manufacturing establishment of Cook & Brother, to be used by them for the service of the Confederate government, in March, 1862.

II. The plaintiffs claim to have bought this coal from Cook & Brother. If Cook & Brother sold it, it was the sale of the property of another, and null. *Vide* C. C. 2427.

But was there any real sale? It is clear that there was not, if all the circumstances of the case are fairly weighed and considered.

1st. The time when it is pretended to have been made is extremely suspicious. It was on the 28th of April, 1862, when the city was about to pass from the control of the Confederate authorities, and to be taken possession of by the national forces.

2d. It was made in an unusual manner. A special power to sell by Cook & Brother, who were not the owners of the coal, is produced in evidence by the plaintiff, dated on the 15th of April 1862. The date of the execution of this pretended power is not established by proof. It was produced, and the signature of Cook & Brother sworn to by two witnesses before a justice of the peace, on the 8th of May, 1862, ten days after the pretended sale, and before the institution of the suit.

3d. The price at which it is pretended the coal was sold to Moore was 65 cents a barrel, when it was worth, according to plaintiff's witnesses, in the month of May, 1862, immediately after the sale, \$1 50 to \$1 75 a barrel.

All these circumstances compel one to believe that the pretended sale was a fraud, and that no sale was made in good faith and for a real price. C. C. 2263, 2267, 1842.

III. There is no legal evidence of any sale to the plaintiff. There is but one witness of the pretended sale, to wit: *J. Andrews* or *Mr. W. J. Andrews*. *Mr. Hoag*, the second person named in the pretended power or authority to sell, says: "I had nothing to do with the selling or delivery of the coal; nothing more than knowing that the sale was going on. The sale was made by Mr. Andrews. I cannot tell when I wrote across the face of the document. I do not recollect at what time I concurred in the sale."

Mr. Andrews says: "I made this sale to Moore." No one present, unless it was Mr. Field, when he made the sale. But Mr. Field gives no testimony as to the making of the contract of sale.

If there was but one witness, W. J. Andrews, to the sale, the judgment must be reversed, for there are no corroborating circumstances. C. C. 2257.

HYMAN, C. J. Plaintiff sued for the value of coal taken forcibly from him by officers of the city.

Defendant answered first by a general denial. Subsequently, she filed

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an amended answer, in which she claimed to be the owner of the coal.

It was admitted that the city took the coal.

Cook & Brother, the vendors of the plaintiff, bought the coal for themselves; and, to pay for it, drew an order on the city. The city paid the order.

This is all the evidence introduced by defendant to establish ownership in the coal. It is unnecessary to say that it is insufficient.

Defendant contends that there is not sufficient evidence, as required by Article 2257 of the Civil Code, of the contract of sale to plaintiff.

Andrews & Hogue were authorized by Cook & Brother, in a written power of attorney, to sell the coal. *Andrews* testified that, acting under this mandate, he sold the coal to plaintiff. *Hogue* testified, that he knew that the sale was going on, and subsequently approved it. Another witness swore that he measured the coal for Cook and plaintiff.

We think that this evidence fully comes up to the requirement of this Article of the Code.

The judge gave judgment against the city for the value of the coal when it was taken.

Judgment affirmed.

GARVINO LEDDA v. CAPTAIN MAUMUS, et als.

By intervening and bonding property attached, the intervenor has relieved it from the lien of attachment, and removed it from the jurisdiction of the court, consequently he is bound as surety for whatever judgment may be rendered against the defendant, which is the tenor of his bond. He cannot, therefore, be heard to construe his obligation so as to defeat the law.

The statute of 20th March, 1839, amendatory of Art. 239 U. P., restricts the judgment to be obtained to the surety on the bond, and does not contemplate a proceeding, by that mode, against the principal.

A PPEAL from the District Court of the Parish of Jefferson, *White, J.*
R. K. Culler for plaintiff.

H. Train & C. Redmond for defendants and appellants.—The intervenor bonded the property attached by plaintiff, and was condemned, as bondman, to pay his claim and judgment.

He appeals because the judgment rendered is void, for want of citation, appearance or representation of Maumus. The defendant then, by plaintiff's own showing within the jurisdiction of the court, and who had no notice of attachment.

He contends that the plaintiff's judgment is moreover void; because, nobody is condemned to pay it; because, it does not dispose of the intervenor's claim, on which issue had been joined; because, it makes no disposition of the property attached, whilst it disposes of sequestered property not in esse. Yet, plaintiff had ten months to consider of it before he confirmed his default.

The intervenor is dissatisfied with the description of the property sought to be subjected to attachment, and which he designates as a certain

flatboat and cargo of staves; a laxity of practice not tolerated in attachment, for the property thus libelled does not admit of judicial identification. LEDDA
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He complains that plaintiff has brought a false action; for his petition sets up a sale which he, plaintiff, perverts into a claim for advances on his own property. He says defendant was entitled to a notice of judgment, and none was given; that execution was irregular, the first being returned without date, and the second within days from its date; that both are decided against the Impersonal, captain and owners, of an uncertain flatboat and cargo of staves; and that these parties are *dehors* the record. The same objection applies to the bond on which attachment issued. The demise of plaintiff is suggested for the first time in the execution, which leaves room for the surmise that the judgment itself was perhaps rendered after his demise.

Concerning the judgment against Begué on his bond, his objection to summary proceedings should have been sustained; it was doubly good: 1. Because, the judgment of sequestration on Begué as bondsman was entitled to a regular trial. 2. Because the same issues were actually pending between the parties in the regular mode of action. These exceptions were never overruled or legally disposed of in the court below. They should have been sustained.

The condition of Begué's bond was to pay such judgment as should be rendered against principal and intervenor in the action then pending. This bond has never been forfeited, because the supposed contingency has not occurred.

It may be superfluous to add that plaintiff introduced no evidence to confirm his default; neither can it be questioned that the intervenor, having bonded the property in controversy, in the capacity of an owner in possession, is vested by law with all the rights of a defendant in reversion.

LISLEY, J. The plaintiff in this case, having attached the flatboat and cargo of staves described by him, one Jean Marie Begué intervened in the attachment suit, by way of third opposition, and set up title to, and possession of, the property attached.

On the motion of the intervenor, the court allowed him to bond the property attached, and, in accordance with the order of the court, he furnished a bond, executed by himself as principal, and one J. Desplate as surety, for the sum of twenty-five hundred dollars.

The judgment by default, taken by the plaintiff against the *defendant*, on the 20th January, 1862, was confirmed and made final on the 17th of February of the same year; and by this judgment the defendant was condemned to pay the plaintiff the sum of fifteen hundred and sixty-nine dollars and fifty-three cents, with a lien and privilege on the property *sequestered*.

The court did not pass upon the claim of the intervenor.

A writ of *fi. fa.* having issued against the defendant in the attachment suit, the same was returned *nulla bona*, when the plaintiff took a rule on the parties to the bond. J. M. Begué, the principal, and J. Desplate, the surety, to show cause why they should not be condemned *in solido*, in ac-

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cordance with the stipulations of their bond, to pay the aforesaid judgment for \$1,569, with interest and costs, and why execution should not forthwith issue against them for the same.

The exception and defence set up by the defendants in the rule, rested on the following grounds :

1. Because the law does not allow such summary proceedings in a case like this.

2. There was no judgment rendered against exceptor or intervenor in the suit, and he bound himself to pay the amount of the bond should a judgment be rendered against him, and not otherwise ; and exceptor was not heard in his defence, and, had it been so, he would have proved that the staves in dispute belonged to him.

3. Even if he could be bound herein, the proceedings are illegal and deficient, and the pre-requisites of the law have not been complied with.

4. The judgment rendered herein is null and of no effect against exceptor, and all the proceedings under it are irregular and insufficient to bind the exceptor.

5. The exceptor is entitled to a trial by jury, and cannot, in such a proceeding, which is summary, pray for the same ; and he prayed for a dismissal of the rule. The rule was made absolute, and the defendants therein have appealed from the judgment of the court below.

In the case of *Emanuel v. Mann, Beers & Bogart, intervenors*, reported in 14 A. p. 53, wherein a defence somewhat similar to the one in this case was urged, the court say : "The defence is purely technical. By intervening and bonding the property attached, the intervenor has released it from the lien of the attachment and removed it from the jurisdiction of the court. Now, if they can defend themselves on the bond, they will defeat plaintiff's claim altogether. In construing the obligation of *Beers & Bogart*, and *Wright*, their surety, we must look to the law and ascertain on what condition the property was to be delivered to them. It was on condition that they would satisfy such judgment, to the amount of the value of the property attached, as might be rendered against the *defendant* in the pending suit. Act of 1852, p. 155, § 1. The condition of the bond, as written, is that the defendants or intervenors shall satisfy such judgment as shall be rendered against them, or either, in the suit pending, to the extent of the valuation of the property released. The principal obligation was, therefore, to satisfy whatever judgment should be rendered against the *defendant* ; and it was the duty of the intervenors so to word their obligation, as the condition upon which the property was to be delivered to them.

They cannot, therefore, be heard to construe their obligation so as to defeat the law. *Slocumb v. Robert*, 16 La. 174.

Having failed in his intervention, they and their surety are responsible upon the bond. The return of *nulla bona* on the execution against Mann is sufficient, and the intervenors could not defeat plaintiff's demand by paying the costs of the intervention, or requiring an execution against themselves.

The case cited in 8 A. p. 381, differs from this, that no judgment had, in that case, been rendered against the third opponent.

The case of *Goodman & Son v. Wm. Allen et al.*, reported in 8 An. p. 381, rested on the case of *Goodman v. Allen*, reported in 6 An., at page 372. The court, referring to the previous decision, held, that as no judgment had been rendered against Carroll, the intervenor, no judgment could therefore be rendered, by rule or otherwise, against his surety on the bond for the release of the property attached. That such a judgment against the surety must be preceded by a *fi. fa.* against, or at least, a putting in default of the principal.

The plaintiffs in the case reported in 8 An., first proceeded against Carroll's surety by rule, and having failed to sustain their motion, then brought a direct action against the same surety; and it was in the decision in the last case, that it was held absolutely and unequivocally, that a final disposal of the intervenor's claim must have been made; or, as stated in the previous decision in 6 An., "a *fi. fa.* must have been issued against the principal obligor, or at least, a putting in default." And the plaintiff's rule was dismissed because no such call had been made upon Carroll for the payment of the bond.

Has judgment been rendered on Bégué, the principal in the bond in this case, or has a legal preliminary call been made upon him?

He was made a party to the rule against the surety, and both were required to show cause in *six* instead of *ten* days, according to the statute of 1839. This was, indeed, a summary proceeding. Such proceedings cannot be extended beyond the cases expressly authorized by law. See Arts. 98, 170, 754 and 756 C. P.; *Baker v. Doane et al.* 3 An. 434; *Austin, Sumner & Co. v. Dunbar*, 12 An. 182; *Nolan's Heirs v. Taylor*, 12 An. 201; *Mussena v. Alling*, 12 An. 799.

The statute of 20th March, 1839, amendatory of Art. 259 C. P., restricts the judgment to be obtained to the surety on the bond, and does not contemplate a proceeding, by that mode, against the principal.

We do not consider the proceeding by rule against Bégué and Desplate, his surety, regular or legal, and think the court erred in making it absolute.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed.

It is further decreed, that the judgment of the District court be reversed, and that the rule be dismissed as in case of non-suit, the plaintiff and appellee paying costs in both courts.

ALFRED KEARNY v. JOHN O. NIXON, et als.

The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. C. P. Art. 895. If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, as containing all the testimony adduced, the Supreme Court can only judge of such cause on a statement of facts prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception to the opinion of the judge, or on a special verdict; and, in the absence of all these, it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following Articles. (895-7.)

A PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. J. Ad. Rozier and Whitaker, Fellowes & Mills* for defendants.

George L. Bright for plaintiff and appellant.—The motion to dismiss is made on the ground that the appellants have not complied with Art. 897 C. P., which provides: "The appellant who does not rely, wholly or in part, on a statement of facts, an exception to the judge's opinion, or special verdict, to sustain his appeal, but on an error of law appearing on the face of the record, shall be allowed to allege such error, if within ten days after the record is brought up, he files in the Supreme Court a written paper, stating specially such errors as he alleges; otherwise his appeal shall be rejected."

In this cause, interrogatories were propounded to Thos. P. May & Co., garnishees. They excepted to the interrogatories and refused to answer. A rule was taken upon them by plaintiffs to show cause why it should not be decreed that they have property belonging to defendant sufficient to satisfy plaintiff's claim. The court dispensed them from answering, maintained the exceptions, and dismissed the rule.

From that judgment, on motion and on suggesting to the court that there is error in the judgment rendered on the 4th April, 1864, maintaining the exceptions of Thos. P. May & Co., and in that rendered on the 16th April, 1864, dismissing the rule taken by plaintiff against Thos. P. May & Co., an appeal was granted to this court.

If it were necessary to state the error in the judgment, it is specially stated in the motion and order granting the appeal.

But no assignment of error is necessary. No evidence whatever was offered and received in the inferior court, and the certificate of the clerk shows that the transcript is complete. An assignment of error is necessary only when the court has no means in the record of ascertaining the correctness of the decision. See the many decisions 1 Hen. Digest p. 76, No. 1. Where the appellant relies for a reversal of the judgment upon grounds apparent upon the face of the record, and the certificate of the clerk states that the transcript contains all the evidence adduced on the trial, no assignment of error is necessary. *Waters, Camden & Co. v. Briscoe*, 11 An. 639.

In *Wood et al. v. Henderson*, 2 An. 221, an exception was filed to the petition, and dismissed; the court said: "The exception having been

overruled by the court below, we are permitted to consider it and the decree of the court upon it, without a formal assignment of error. This is not such a case as is contemplated by Art. 897 of the Code of Practice.

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* * * The petition, exception and judgment thereon, are fully presented by the record; and, if a mere bill of exceptions can be examined in this court without filing an assignment of error, the matter in question is certainly open to consideration without that formality.

In *Hiestand v. City of New Orleans*; 14 An. 137, the court said: "Considering that the case went off in the court below upon an exception to the sufficiency of the plaintiff's petition, which admitted all the allegations of fact therein contained to be true; and that in *Wood v. Henderson*, 2 An. 220, no assignment of errors was held necessary in this class of cases," refused to dismiss the appeal, for want of an assignment of errors.

In *Nott v. Brander et al.*, 14 La. 370, the court said: "In the case now under consideration, we have the certificate of the clerk, that the record contains a copy of all the proceedings, as well as of all the documents filed, and all the testimony adduced on the trial of the cause. With such a full and complete transcript before us, the appellants might well, at any time, have called our attention to any error on the face of the record. They might even have safely tried their case on its merits, without making any assignment at all.

The transcript shows the exception and rule were tried on the pleadings without any evidence.

Where a bill of exception to the ruling of the court is not necessary, we cannot conceive the necessity for an assignment of errors. The law never requires a useless thing to be done. An assignment of error is to point out the error in the record.

In *Psyche v. Parodel*, 6 L. 380, the court said: A bill is not necessary when the inferior court overrules an exception in writing. In *Harrison v. Waymouth*, 3 R. 340, the court said: A bill is only necessary where something is to be brought to the knowledge of the appellate court which would not otherwise appear on the record.

LABAUVE, J. The defendant, John O. Nixon, has filed a motion to dismiss this appeal, on the ground that the appellant has failed to comply with the provisions of Art. 897, C. P., in not filing in this court, within ten days after the filing of the transcript, a written paper stating specially such error as he may allege to be apparent on the face of the record.

This article must be taken in connection with the other two next preceding. The article 895 says: "The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matter argued or contested below." Article 896: "If therefore the copy of the record brought up be not duly certified by the clerk of the lower court, as containing all the testimony adduced, the Supreme Court can only judge of such cause on a statement of facts prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception to the opinion of the judge, or on a special verdict, and in the absence of all these, it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following article:

"The clerk certifies that the foregoing twenty-seven pages contain a

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true, correct and complete transcript of all the documents filed, of all the evidence adduced and all the proceedings had in the suit."

This certificate is in full compliance with the first clause of said article 896 C. P., and gives this court a full knowledge of the matters argued and contested below.

The article 897, relied on, cannot apply when the record comes up with such a certificate as the one before us.

Motion to dismiss overruled.

STATE *ex relations* FRANCIS L. MEAD *v.* HON. J. K. BELDEN, Judge of the Third Judicial District.

One, whether a party or stranger to the cause, may appeal from a final judgment, if he alleges that he is aggrieved thereby; and, from an interlocutory judgment, when such judgment may cause him an irreparable injury; provided the amount or value in dispute is sufficient, and the party is not debarred by his own act from taking an appeal.

A PPEAL from the Third Judicial District Court of the Parish of Terrebonne. *Belden, J.*

H. A. Gallup for Mead, Relator.

HOWELL, J. The relator alleges that, in the matter of the succession of Mrs. Celeste Tanner, deceased, opened in the parish of Terrebonne, at the suit of *E. W. Blake v. Winchester Hall*, a judgment was rendered on 21st September, 1865, removing said Hall as administrator of said estate, and appointing two of the beneficiary heirs, Mrs. R. D. Jordan and Franklin Tanner, co-administrators thereof, upon complying with the requisites of the law, said heirs having intervened in said proceedings; from which judgment said Hall has appealed; that, on the 17th October following, he (the relator) and other creditors, whose aggregate claims amount to about \$80,000, upon written motion, suggested to the court that the said co-administrators had suffered more than ten days to elapse after their appointment, without having either qualified or caused an inventory to be begun, and moved the court to forthwith, and *ex officio*, appoint a successor in office, as if no such officers had been appointed; that, on the trial of said motion, on the 20th October, concurrently with one previously made to have the said Mrs. R. D. Jordan and Franklin Tanner appointed provisional administrators, the court overruled his motion, and ordered that the said Mrs. Jordan and F. Tanner be allowed to qualify as provisional administrators, and granted them a delay of thirty days for that purpose; from which judgment he prayed for an appeal, on the ground that it was "contrary to the law and the evidence; that he was seriously aggrieved thereby, and would suffer irreparable injury therefrom, especially in allowing the appointees, B. F. Tanner and Mrs. R. D. Jordan, thirty days within which to qualify as provisional administrators, at the same time tendering a bond in such amount as the court might fix," which was refused; and he now prays for a writ of *mandamus* to compel the said judge to grant him an appeal.

To which the District Judge answers that the appeal taken by the said Hall, having prevented the said appointees from acting, and the succession being without a representative, and suffering thereby, it was necessary to appoint them provisionally, pending the appeal; that thirty days were allowed as a reasonable and necessary time, within which to take an inventory of such a large estate and for the administrators to qualify and give bond; which delay could not, in his opinion, cause the relator any injury, as he would be amply protected by the required bond; and that the appointment of Hall, as desired by the relator in his motion, was in conflict with the action of the court in the proceedings now on appeal.

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JUDGE 3d J. Dt.

By law, one, whether a party or stranger to the cause, may appeal from a final judgment, if he allege that he is aggrieved thereby, and from an interlocutory judgment, when such judgment may cause him an irreparable injury, provided the amount or value in dispute is sufficient and the party is not debarred by his own act from taking an appeal. C. P. Arts. 565, 566, 567, 570 and 571.

Without deciding whether or not the judgment complained of in this instance is final, or merely interlocutory, we think that, as the estate is a large one, subject to waste, and apparently much involved, the relator, who is a creditor to a large amount, may suffer an irreparable injury in consequence of the unusual delay of which he complains, and especially so, should the persons, appointed provisional administrators, as alleged, fail to qualify within the time allowed. We are the more disposed to grant the application, from the consideration that an appeal will not interfere with the administration that may be conducted during its pendency.

It is therefore ordered that the rule be made absolute, at the costs of the defendant herein, and that a peremptory writ of *mandamus* issue in the name of the State of Louisiana, addressed to the Hon. James K. Belden, Judge of the Third Judicial District of Louisiana, directing him to grant an appeal to the relator, Francis L. Mead, as prayed for by him, from a judgment rendered on the 20th October, 1865, in a proceeding had on the suit of *E. W. Blake v. W. Hall*, No. 2568 on docket of the District Court for the parish of Terrebonne.

L. F. FOUCHER v. PAUL CHOPPIN.

If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.

A PPEAL from the Sixth District Court of New Orleans, *Duplantier. J. J. Magne* for plaintiff and appellant.

C. Dufour for defendant.—1. The defendant bases his defence upon Art. 2667 of our Code.

2. The spirit of this Article pervades our whole legislation on the subject. See Arts. C. C. 1893, 2662, 2666, 2669, 2699.

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3. Our Art. 2667 C. C. is drawn from Art. 1722 Napoleon Code, and both are nearly identical in terms. See the Commentaries of Marcadé on this Art. 6 Marcadé, 450.

4. The difference in the two Articles, as found in our Code and in the French Code, is that, ours allows a wider margin for the operation of the principle, and affords a more solid basis for the application of Marcadé's illustrations, than even the Article in the French Code. See both articles.

HOWELL, J. Plaintiff sues for the rent of a plantation and brickyard in the parish of Jefferson, from the 16th June, 1861, to 16th October, 1862. The defendant admits the contract of lease, but alleges that, during the time for which rent is claimed, the premises were rendered useless and unfit for the purposes contemplated in the lease, by reason of the military occupation of the place; that the sums paid by him during said period are full compensation for the small portion occupied by him, and that, having been evicted by military power, he is entitled to the annulment of the lease from the date of the eviction.

It is shown that, in June, 1861, about the time from which rent is claimed, Camp Lewis was established on the vacant or pasture grounds of the leased property, in the rear of the portion occupied by the buildings, brickyard, garden, etc.; that defendant was hindered in the free use of a private railroad, used for transporting bricks from the brickyard, near the levee, back to the New Orleans and Carrollton Railroad, until January, 1862, when its use was destroyed by the removal of the iron from the rails by the Confederate troops, which abandoned the camp on the arrival of the national forces, about the end of April, 1862; that said camp ground was taken possession of by the latter troops, some time in August following, from which time the defendant suffered more or less annoyance and inconvenience, until about the 18th October, 1862, when he was ordered to leave, and the buildings were taken for a hospital by the United States military. From that date the plaintiff abandons all right to rent from the defendant.

The defence is founded upon Article 2667 C. C., which provides that: "If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages."

If, during the period embraced in the bill sued on, the military forces had evicted the defendant and taken possession of all the leased premises, it is not denied that the lessee would have been relieved from all liability under the contract of lease. The plaintiff virtually admits this by waiving his right to rent, after that event actually occurred. Applying the same principle, the defendant should be relieved to the extent to which he has been dispossessed by the same overpowering force, if the evidence furnishes the data for making the diminution. There is no proof of the rent of the railroad, or the value of its use to defendant. It is, however, shown that the grounds occupied by the troops had yielded him a rent of one hundred dollars per month, which we adopt as the standard of deduction to be made. The dispossession continued during the whole time for

which rent is claimed, except from the last of April, 1862, to the middle of August of the same year. We are of opinion that, under an equitable application of the above law, the defendant is entitled to a deduction of one hundred dollars per month, during the actual occupation by the military forces of a portion of his premises, say \$1,250 for twelve and a half months.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be reversed, and that plaintiff recover of defendant eleven hundred and seventy-five dollars (1,175), with legal interest from 15th October, 1862, and that he be entitled to the possession of the leased premises, as prayed for. The appellee to pay costs in both courts.

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v.
CHOPPIN.

UNION BANK OF TENNESSEE *v.* BULLITT, MILLER & Co.

In cases of insolvency all the ordinary debts, even those not due, are on an equality and must be paid proportionally.

A PPEAL from the Fourth District Court of New Orleans, *Price, J.*
Chas. E. Fenner for plaintiff. *Henry C. Miller* for defendant Miller.

LABAUVE, J. The defendants are sued for \$3,107 74, balance due on three bills of exchange drawn by Matthews, Finlay & Co. of New Orleans, on Finlay, Kissam & Co. of New York, to the order of and endorsed by the firm of the defendants, Bullitt, Miller & Co. One of them, for \$2112 30, was accepted by the drawees and protested for non-payment. The other two, for \$1,056 15 each, were protested for non-acceptance and non-payment, all of the same date, 14th October, 1854, payable, the one for \$2,112 30 in 60 days, and the other two in 70 days from date.

The defendants answered first by a general denial; in supplemental answers they claim to have been discharged from all the bills. They also allege that plaintiffs have received various sums from L. A. Finlay, the syndic of the creditors of said Matthews, Finlay & Co., as stated in the account annexed to plaintiffs' petition, as follows, to wit: \$473 10 on the 16th November, 1855; \$319 20 on the 14th November, 1856; \$375 on the 23d June, 1859; and \$51 72 on the 21st October, 1859, which were dividends accorded to them from the property surrendered by said Matthews, Finlay & Co., the drawers, and for which they were placed upon the tableau of distribution. That said drawers, Matthews, Finlay & Co., had made a surrender of their property on the 6th December, 1854, and the said bills of exchange were stated as composing part of their obligations, and plaintiffs were placed as creditors for said amount of said bills. That Finlay, Kissam & Co., acceptors of the bill for \$2,112 30, made an assignment of their property in New York, on the 10th February, 1855. That the plaintiffs received from their assignee \$844 92, being 40 per cent., as a dividend upon said bill of exchange due by said acceptors, and in consideration of said receipt and one dollar, said plaintiffs released and discharged the said acceptors on the 11th April, 1855; and that by said discharge of said acceptors, respondents are also released as endorsers.

UNION B'K TENN
BULLITT.

Judgment was rendered below, for plaintiffs and against defendants, for \$2,067 97, with interest; both parties appealed.

The testimony and admissions of the parties established the material facts set up in the answer, and among others, that the plaintiffs had granted a complete discharge to the said acceptors as alleged.

On the 15th November, 1855, a dividend of 14 per cent. was paid by L. A. Finlay, syndic, and credited on each of said three bills; \$177 45 on the bill of \$2,112 30 accepted by the drawees; and \$147 85 on each of the other two not accepted; various other subsequent payments, in all \$746 44, were also made by said syndic, but not credited on the bills.

The defendants, who are sued as endorsers of said bills, contend that the discharge of the drawees and acceptors, by the plaintiffs, completely released them also as endorsers. But plaintiffs have attempted to show by a letter of the defendants, that this discharge had been granted under instructions and at the request of said defendants. This letter reads as follows:

“New Orleans, March 2d, 1855.

James Corry, Esq., Cashier Union, Nashville, Tenn.

Dear Sir :

Mr. Finlay, of the house of Matthews, Finlay & Co., called on us to say he was prepared to pay 40 per cent. on account of their drafts endorsed by us, drawn on Finlay, Kissam & Co., New York, and that as soon as the property of their house here was disposed of, they would make a further payment. We presume you will instruct your agents here to accept of this proposition, and, as a matter of course, we will be bound for the difference. * * * * *

(Signed)

BULLITT, MILLER & Co.,
in liquidation.”

We are of opinion that this letter cannot be construed as giving consent or instructions to plaintiffs to grant a discharge to the acceptors on their paying 40 per cent. on the draft endorsed by defendants, and that therefore the plaintiffs have lost all recourse against the defendants as endorsers upon the bill for \$2,112 30. The plaintiffs now contend that all the payments made by L. A. Finlay, syndic, to the plaintiffs, should be imputed on the bill for \$2,112 30, as being the one first due, and they rely on Art. 2162 C. C. Such proposition is unsustainable in this case; these payments were dividends distributed among the three bills of exchange; in cases of insolvency, all the ordinary debts, even those not due, C. C. Art. 2049, are on an equality, and must be paid proportionally.

After proper calculation and deduction of proportional payments (dividends), we have found a balance due plaintiffs on the two smaller bills, on the 24th November, 1859, of \$1,967 80.

It is therefore ordered, adjudged and decreed, that the judgment of the District court be annulled and reversed. It is further ordered, adjudged and decreed, that the defendants pay *in solido* to plaintiffs the sum of nineteen hundred and sixty-seven dollars and eighty cents, with legal interest thereon from the 24th November, 1859, till paid, and costs of suit in the District court, and that plaintiffs pay the cost of this appeal.

JOHN COLEMAN v. POYDRAS ASYLUM.

The usufructuary is liable, during his enjoyment, to all the annual charges, to which the things subject to the usufruct may be liable.

He is obliged to pay all taxes and contributions imposed on the property subject to the usufruct, as well as all ground rents which may have been charged upon the property, previous to the commencement of the usufruct.

The usufructuary is also bound, during his enjoyment, to cause to be made and repaired the roads, bridges, ditches, levees and the like, for which the estate of which he has the usufruct, may be liable.

With respect to extraordinary or temporary charges, which may be imposed on things subject to the usufruct during its pendency, the usufructuary is bound to support them, unless they are of a nature to augment the value of the property subject to the usufruct.

In this last case the usufructuary is bound to pay them, and shall be reimbursed by the owner at the termination of the usufruct, for the capital expended only.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J.*
Durant & Horner for plaintiff. *M. M. Cohen* for defendants and appellants.

LABAUVE, J. The plaintiff claims against the defendants the sum of \$4,632 66, for having paved, under a contract with the city of New Orleans, Julia street, between St. Charles and Carondelet streets, and in front of defendants' property. He prays for judgment with a privilege and mortgage on the property.

The defendants answered by a general denial, and said they were not bound to pay any part of said demand; that, on or about the 25th March, 1857, they had transferred a portion of said property for a period of fifty years, by a contract of emphyteosis, to Thomas B. Lee; and, on the 31st March, 1859, another portion to G. W. Campbell, etc.

The district court gave judgment in favor of plaintiff against defendants, as prayed for, and the said defendants took this appeal.

We find in the record, in evidence, the two acts of lease referred to in the answer; they are both of the same tenor, and containing the same obligations, stipulations and dispositions. In fact, the act of lease to Dr. G. W. Campbell, produced here, is the same one which was submitted to our consideration, and upon which we gave a decision, in the case just decided—*C. Connell v. Female Orphan Asylum and G. W. Campbell*, No. 10 in this court. In that case, after due examination of said contract in all its bearings, and the authorities applicable to it, we came to the conclusion that said contract (so called) of lease was in law a contract of sale, constituting and establishing an usufruct on time and for the term agreed upon. And for the same reasons given, and upon the same authorities cited in that case, we must decide in the present case that the two contracts now submitted to our consideration contain a constitution of usufruct and are governed by the laws on that subject.

But this case is not in a position to allow us to proceed to render the required final decree; the usufructuaries, who are the true and direct debtors, C. C. Arts. 572, 573, and who have valuable improvements on the lots upon which a mortgage and a privilege are sought to be enforced, are not in court; the case must be remanded to give an opportunity to plaintiff to make proper parties.

COLEMAN
FOYD'S ASYLUM

It is therefore ordered, adjudged and decreed, that the judgment of the District court be annulled and reversed; that the case be remanded to make proper parties, and to be proceeded in according to law, and that the plaintiff and appellee pay the cost of appeal.

HOWELL, J., recused.

JOSEPH D. WEAVER v. KEARNY & BLOIS.

The owner of any promissory note, bond, or written obligation, for payment of money, to order, or bearer, or transferrable by assignment, shall have the right to collect the whole amount of such promissory note, bond or written obligation, notwithstanding such note, bond or written obligation may include a greater rate of interest or discount than eight per cent. per annum, provided such obligations shall not bear more than eight per cent. interest per annum after their maturity.

The evident object of the legislature in passing these acts was, that there should be no stipulation for interest exceeding the rate of eight per cent., unless the parties contracting for a greater rate of interest on a valid claim should add the interest to the claim in making the amount of the written obligation. It did not design that usurious interest, included in a written obligation, stipulated for another debt not included therein, should be collected.

A PPEAL from the Third District Court of New Orleans, *Handlin, J.*
Fellowes & Mills for plaintiff. *George L. Bright* for defendants and appellants.

HYMAN, C. J. Plaintiff sued defendants on several promissory notes payable to his order, made by defendants in the years 1863 and 1864.

He prayed judgment against them for the amount of the notes, with legal interest from their respective maturity, cost of protests and cost of suit.

The judge rendered judgment against defendants as prayed for, and they have appealed from the judgment.

Defendants, in answer, averred that the note for \$784 98 (one of the notes sued on) was given to plaintiff for usurious interest. They propounded interrogatories on facts and articles to him, and his answers to the interrogatories establish the facts that \$228 05 was the only valid consideration for the note, and that \$556 84 added to make up the amount for which the note was given, was interest at the rate of three per cent. per month on two other claims.

On the 15th March, 1855, the legislature passed an act to regulate the rate of interest; and provided therein, that all debts should bear interest at the rate of five per cent. per annum, from the time they become due; and that conventional interest, in no case, should exceed eight per cent., under pain of forfeiture of the entire interest so contracted.

Since then, the legislature passed two other acts in relation to the rate of interest; one on the 20th March, 1856, the other on 2d March, 1860; and, in these acts, it is disclosed that the owner of any promissory note, bond or written obligation, for payment of money to order or bearer, or transferrable by assignment, shall have the right to collect the whole amount of such promissory note, bond or written obligation, notwithstanding such note, bond or written obligation may include a greater rate of interest or discount than eight per cent. per annum, provided such

obligations shall not bear more than eight per cent. interest per annum after their maturity.

The evident object of the legislature in passing these acts, was that there should be no stipulation for interest exceeding the rate of eight per cent., unless the parties contracting for a greater rate of interest on a valid claim should add the interest to the claim in making the amount of the written obligation. It did not design that usurious interest, included in a written obligation, stipulated for another debt, not included therein, should be collected.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed. It is further ordered, adjudged and decreed, that the plaintiff, Joseph D. Weaver, do recover of the defendants, Alfred Kearny and Thomas Blois, and of the commercial firm of Kearny & Blois, *in solido*, the sum of seven thousand two hundred and thirty eight dollars and eleven cents, with legal interest on \$228 05 from 14th December, 1863; on \$250 from February 12th, 1864; on \$1,100 from 26th February, 1864; on \$1,600 from 20th February, 1864; on \$364 12 from 7th March, 1864; on \$450 from 10th March, 1864; on \$1,021 50 from 13th March, 1864; on \$1,980 from 15th March, 1864, and on \$244 44 from 12th February, 1864, till paid; \$19 80 costs of protest and costs of suit in the District court; costs of appeal to be paid by plaintiff.

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v.
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ON A PETITION FOR A REHEARING.

JONES, J. This appeal is taken for delay; but as no answer has been filed by the appellee, asking for damages for frivolous appeal, we simply affirm the judgment, with costs.

HOWELL, J. While an application for a rehearing in this cause was under consideration, a judgment appears to have been rendered on the merits *as on a rehearing*. It is evident that this second judgment is irregular and without legal effect, as the rehearing should have been first disposed of and the parties allowed an opportunity to furnish arguments in the event of a *rehearing being granted*. We must therefore consider the case still before us as on the application of plaintiff for a rehearing of the judgment rendered on 18th December, 1865.

He complains that the judgment is based on a misapprehension of the facts as to the usurious interest embraced in the note for \$784 98, and which was declared forfeited. In his answer to the second interrogatory he says: "The balance after deducting the due bill" (which was for \$228 05) "was for interest at 3 per cent. per month" (on other obligations). Under our interpretation of the acts of 1856 and 1860, this is not a valid consideration.

It is therefore ordered that the rehearing be refused, and the judgment rendered by us on 18th December, 1865, remain undisturbed as the final judgment in this case.

THE STATE *ex rel.* JAMES GONEGAL *v.* THE JUDGE OF THE THIRD DISTRICT
COURT OF NEW ORLEANS.

This court has only appellate jurisdiction. It is not vested with the power of correcting decrees of other courts, except on appeal. See Const. Art. 70.

It has no authority to take original jurisdiction of the case, substitute its opinion for that of the judge of the lower court, and force him to pronounce its opinion, not his own, on the rights of the parties.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J.*
C. Roselius for relator.

HYMAN, C. J. The relator, James Gonegal, avers that B. A. Shepherd sued, in the Third District Court of New Orleans, Woodman & Bement, for rent of certain real property in the city of New Orleans, and obtained a writ of provisional seizure; that, under the writ, the sheriff had seized his goods in the premises let to Woodman & Bement; that he intervened in the suit, and took a rule on the sheriff and plaintiff to show cause why he should not be allowed to deposit in court such sum as the court might fix, to be applied in payment of any judgment which plaintiff might obtain, as a lien or pledge on his goods, and that, upon his depositing such sum, his goods should be released from seizure.

He further avers that the judge of said court, after advisement, entered an order dismissing his rule and denying his prayer; that he is entitled to the remedy applied for; that the judge, in refusing the rule, declined to do what in law he was bound to do; that the order of the judge is a denial of justice to him, and that the slowness of ordinary legal forms is likely to produce such a delay, that the public good and the administration of justice will suffer from it.

He prays that a writ of *mandamus* issue, directing the judge to make the rule absolute, or show cause to the contrary, and that a peremptory *mandamus* issue ordering him to make it (the rule) absolute.

The complaint against the judge, as set forth, is not that he refused to perform his duties as an officer, but that his decision on the relator's rule was contrary to law and justice.

This court has only appellate jurisdiction. It is not vested with the power of correcting decrees of other courts, except on appeal. See Const. Art. 70.

It has no authority to take original jurisdiction of the case, substitute its opinion for that of the judge of the lower court, and force him to pronounce its opinion, not his own, on the rights of the parties. See 13 An. 482-3.

The probability that the public good and the administration of justice may suffer from delay, as alleged by relator, cannot give this court original jurisdiction, or the power of reversing the decree of the lower court, without appeal therefrom.

Mandamus refused.

LIST OF CASES NOT REPORTED.

NEW ORLEANS.

Bridgeford & Co. *v.* Bostick & Seymour.
Day, W. K. *v.* Leathers, T. P.
Doyle, Mrs. Patrick, *v.* F. Ecrot.
De Goicouria *v.* Spencer Field.
Elliott, Joseph *v.* Mrs. Jane M. Baldwin.
Ferguson, John *v.* Robinson, W. G.
Hicklin, Edward *v.* Maillot, Jos. & Co.
Hoelzel, Philip *v.* Bard, Jas. J. et als.
Hyde & Mackey *v.* Girardey, V. T. B.
Hazeur, Hyde et als. *v.* The Jefferson and Lake Pontchartrain R. R. Co.
Llallande, J. *v.* Gourdain, J. V.
Milch, A. *v.* John Sinclair.
Mercier, A. *v.* Harrison, B. S.
Noble & Kaiser *v.* Steamboat Wm. Burton et als.
Noble & Kaiser *v.* Shannon, Jos. R. & Co.
New Orleans, use of Nicholson & Co. *v.* Donnell, O. J.
Roy, Pierre *v.* Gubernator, J. L. et al.
St. Gine, Widow De *v.* Fouche, Thomasson
Smarden, Thomas *v.* Steamer A. W. Baker.
Scott, S. R. *v.* Giffney & Lovell.
White, W. W. *v.* Chase, Chas. H.
Wolverton & Barringer *v.* James Hill.

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ABSENTEE.

In a redhibitory action the prescription of one year does not apply, except from the date of the discovery of the vice; and then not in the case of an absentee against whom no process could issue within that period. *Contra non valentem agere non currit prescriptis.*

Murphy v. Gutierrez, 269.

ACTION.

Citation being the essential ground of all civil actions, in ordinary proceedings, the neglect of that formality annuls radically all proceedings had, unless the defendants have voluntarily appeared in the suit and answered the demand.

McCan & Harrell v. Steamer Golden Age et als., 91.

Where a suit is commenced by a writ of sequestration, the judgment of the court below should have been *in rem* alone, reserving to the plaintiffs their right to an action *in personam*.

Peterson v. Willard, 93.

Actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge, if he fails to do it.

Pecquet v. Pecquet's Executor et al., 204.

The act of 18th March, 1855, for a suit in damages, under Art. 2294, is a legal subrogation in favor of the persons there designated, to the right of action of the deceased sufferer, and the plaintiff must allege his cause of action as derived from the deceased.

Earhart v. N. O. & C. R. R. Co., 243.

ACCOUNT.

Where, in complicated accounts between the syndic and the creditors, the court *a quo* appointed an umpire to decide, and an accountant to investigate the accounts, the judgment will be affirmed.

Diverges v. His Creditors, 112.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVANCES.

Where a firm makes advances on consignments, they cannot be required to forward them to third persons subsequently, and thus be deprived of their privilege.

Bowker & Edmonds v. Connolly & Co., 12.

AFFIDAVIT.

See PRACTICE.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

APPEAL.

Damages will be allowed for a frivolous appeal, when prayed for by the appellee in his answer.

Beatty v. Schwartz et als., 11.

Where the appellee does not claim damages by his answer for a frivolous appeal, none can be granted.

Cockburn v. Groves & Co., 18.

A motion to dismiss an appeal for informality must be made within three judicial days after the record is filed in this court.

Eupheme, f. v. c., et als. v. Maran et al., 21.

The verdict of a jury will not be disturbed except for good cause, and damages will be allowed on an appeal from a judgment thereon.

Field & Shackleford v. Campbell, 30.

The judgment of the court *a quo* will not be disturbed, unless good reasons are assigned therefor.

Hoffman v. Dunham et al., 36.

An appellant who does not file within ten days after the record is brought up a written paper specifying an error of law appearing on the face of the record, unless he rely upon a statement of facts, an exception to the judge's opinion, or special verdict, will have his appeal rejected.

Kenion v. Hawes, 36.

The verdict of a jury, and consequent judgment thereupon, will not be disturbed, except for solid reasons.

Olivier v. Randolph, 50.

Where the counsel of the appellee does not file an answer to the appeal, he can be allowed no damages as for a frivolous appeal. His brief is not considered an answer.

Verges v. Noel et al., 67.

The clerk of a court has a right to demand security for the cost of the transcript of appeal. He is not forced to rely upon the uncertain security of an appeal bond.

The State v. Behrens, Clerk, &c., 67.

APPEAL, (Continued.)

Where a party is guilty of laches by not urging his claim in due time and place, he cannot complain in this court.

Tibben v. Gratia & Co. et al., 72.

Where there is no prayer for a citation of the appellee, and he is not cited, it is a good ground for a dismissal of the appeal.

Schmidt v. Benit, 74.

The same v. Jules Benit, *Ibid.*

Where a judgment bears eight per cent. interest only five per cent. damages will be allowed for a frivolous appeal.

Lamothe v. Lamarque, 77.

Where the appellee moved to dismiss the appeal, that the case having been tried by a jury, no motion was made for a new trial—*Held*: That it is a good reason to affirm the judgment, but cannot be to dismiss the appeal.

Lafrance v. Martin, 77.

It is not necessary that more than one of the principals and the surety shall sign an appeal bond.

Ibid.

Where a statute has been repealed since the rendition of a judgment, inflicting a penalty, in the court *a quo*, this court cannot affirm it.

Mouras v. Schooner Brewer et als., 82.

An error of calculation, patent on the face of the record, made in the court below, will be corrected on appeal without suggestion.

Moore & Co. v. McConnell, 84.

Where there is not in the transcript of appeal either a final judgment, signed by the judge, or such interlocutory judgment as may work irreparable injury, the appeal will be dismissed at the costs of the appellant.

North v. Leathers, 97.

Where the record does not show a transfer of a right to the plaintiff, the case will be remanded.

Connell v. Brown, 111.

A citation of appeal to this court, from a judgment rendered by a justice of the peace, must be issued as if it had been rendered in a District court, otherwise the appeal will be dismissed.

The Mayor et al. of Carrollton v. Gaillard, 120.

Where there is no error of law appearing on the face of the record, the case will not be dismissed.

Bouligny v. Mme. Fortier et ux, 121.

To obtain damages for a frivolous appeal the appellee must bring himself within the requirements of the law, and claim them in his answer.

Pecoul, Executor, v. De Mahy, 125.

APPEAL, (*Continued.*)

When a co-defendant does not join in the appeal, his status cannot be inquired into.

Roman v. Denny, 126.

On an appeal from an order of seizure and sale, the legality of the order only can be examined. Other irregularities must be corrected in the court *a quo*.

Ibid.

Where documents offered in evidence below are not to be found on the record, the appeal will be dismissed.

Hall v. Beggs et als., 130.

Damages for a frivolous appeal must be asked for in the answer of the appellee.

Frost v. Garrett & Winne et als., 134.

Where the note sued on bears eight per cent. interest, no special damages will be allowed as for a frivolous appeal, and this court will simply affirm the judgment of the court below.

Harris v. Peel, 140.

Any amendment of the judgment in the court below must be prayed for in the answer to the appeal; it will not be noticed in the brief.

Hite v. Barker, 141.

An appeal will lie from a judgment on a rule in the court below dismissing an opposition to an order of seizure and sale.

Hest v. Kelly, 143.

Where the judge of the court below gives judgment for the plaintiff, but makes no allusion to the plea in reconvention, set up by the defendant, it is an irregularity, and the case will be remanded.

Sientes v. Odier & Co., 153.

Where no evidence appears on the face of the record to show why a rule taken to set aside an injunction against an order of seizure and sale should not be made absolute, the judgment of the lower court to that effect will be affirmed.

Mrs. Wheeler v. Stewart, 167.

Where the note sued on bears eight per cent. interest, and the judgment below is for the same rate of interest, no damages will be accorded as for a frivolous appeal.

Saloy v. Gubernator et al. 169.

Where the defendant is cited personally, and as president of a company, and answers for himself alone, there is no issue joined, and the case will be remanded.

City of Jefferson v. Kaiser et al. 176.

If the appellee demand the reversal of any part of the judgment, or damages against the appellant, he must file his answer at least three days before that fixed for the argument, otherwise it shall not be received.

Barrett v. Donovan et al. 182.

APPEAL, (*Continued.*)

Where the appeal is taken within the usual delay, and security offered, a mandate will issue compelling the judge *a quo* to send up the appeal, if the case is not within the exceptions mentioned in Article 580 of the Code of Practice.

State v. Judge Third District Court, 186.

An appellant may be relieved when he has been prevented by circumstances beyond his control from obtaining and filing the transcript of appeal, although the clerk's certificate has been delivered to the appellee.

Wright & Co. v. Brander, Sr., et al., 187.

The absence of counsel furnishes no cause for excuse for not complying with the forms of the law.

Ibid.

Where the suit was originally for more than three hundred dollars, but a part was remitted so as to reduce it below that amount, this court cannot entertain jurisdiction. But where a reconventional demand is set up for an amount over three hundred dollars, the court will hear the defendant's appeal on *that*.

Widow Vincent v. Schweitzer, 199.

No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered.

Hall v. Beggs, 238.

A second appeal may be granted when the first has been dismissed without a decision on its merits.

Ibid.

Where an appeal was taken in the court *a quo*, the fact that no appellate court existed would not interrupt the prescription. It might be otherwise if there had been no judge in the lower court to grant an appeal.

Ibid.

When a judge of an inferior court refuses to decide on the rights of litigants, this court cannot issue the mandate applied for to secure its appellate jurisdiction; nor when he decides adversely to the pretensions of a party. The reasons which he may give for his judgment cannot give this court original jurisdiction.

The State, on the relation of Alter v. Judge 4th D. C. of N. O., 282.

Our jurisdiction is only appellate, and we cannot correct, except on appeal, the judgments of other courts. Const. Art. 70.

Ibid.

The legislature has provided the manner by which an appeal may be taken. It is not by *mandamus*.

Ibid.

APPEAL, (*Continued.*)

When the creditors of a succession, or an insolvent estate, who have an important interest in maintaining a judgment, have not been cited, nor their citation asked for by appellant, the appeal will be dismissed.

Succession of Constance Perret, 302.

The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. C. P. Art. 895. If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, *as containing all the testimony adduced*, the Supreme Court can only judge of such cause on a statement of facts prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception to the opinion of the judge, or on a special verdict; and, in the absence of all these, it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following articles. (896-7).

Kearny v. Nixon et als., 318.

One, whether a party or stranger to the cause, may appeal from a final judgment, if he allege that he is aggrieved thereby; and, from an interlocutory judgment, when such judgment may cause him an irreparable injury; provided the amount or value in dispute is sufficient, and the party is not debarred by his own act from taking an appeal.

The State, ex rel. Mead, v. Judge 3d. Judicial District., 320.

This court has only appellate jurisdiction. It is not vested with the power of correcting decrees of other courts, except on appeal. See Const. Art. 70.

State. ex rel. Gonegal, v. Judge 3d Dist. Court of N. O., 328.

It has no authority to take original jurisdiction of the case, substitute its opinion for that of the judge of the lower court, and force him to pronounce its opinion, not his own, on the rights of the parties.

Ibid.

ATTACHMENT.

Where parties are not shown to have been in actual or constructive possession, as *owners* of the property at the time it was attached, they have not the right to bond it.

Letchford & Co. v. Jacobs et als., 79.

The intervention may stand, although the motion to bond by the intervenors be dismissed.

Ibid.

Until goods have been received and reshipped, or until the receiver had notified the eventual consignees that they would be forwarded according to instructions, they must be considered as under the control of the receiver, and, of course, liable to attachment by their creditors.

Von Phul, Waters & Co. et al. v. Powell & Co., 165.

ATTACHMENT, (Continued.)

The creditors of a consignor can attach merchandize, or its proceeds, in the hands of the consignee, until the instructions, verbal or written, to pay the proceeds of sale to a third party have been communicated to, and the stipulation in his favor accepted, by him. The principle is, that the consignee must come under direct obligation to the assignee.

Relf & Co. v. Boro et al., 258.

There is no such interest shown in a third party as to require him to be cited; nor to make it unsafe for garnishees to pay as ordered.

Ibid.

ATTORNEY AT LAW.

The absence of counsel furnishes no cause for excuse for not complying with the forms of the law.

Wright & Co. v. Brander, Sr. et al., 187.

BAILMENT.

A depository is not answerable, in any case, for acts produced by over-coming force, such as fire; unless he failed to use proper diligence.

McCullom v. Porter et als., 89.

No bailee is responsible for not insuring goods under his charge, unless he has instructions so to do.

Duncan v. Boyé, 273.

BANKRUPTCY.

See **INSOLVENCY**.

BANKS AND BANKING.

In the absence of any special agreement or understanding between a banker and a depositor, where the deposit is an irregular one; when an open account is kept; where moneys are deposited in bank to be drawn out, not in the indential funds deposited; where moneys deposited are mingled with the cash assets of the bank, and used indifferently with his own; the relations between a bank and its depositors are well and definately fixed by our own law and jurisprudence, and by that of other countries, in which business is transacted with such institutions.

Schmidt v. Barker, 261.

Such deposits are not real deposits, but are loans for use to the banker.

The money so deposited transfers the property to the loanee; and the relation between a bank and its customers, in regard to irregular deposits so made, is simply one of debtor and creditor.

Ibid.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

The owner of any promissory note, bond, or written obligation, for payment of money to order, or bearer, or transferrable by assignment, shall have the right to collect the whole amount of such

BILLS OF EXCHANGE AND PROMISSORY NOTES, (*Continued.*)

promissory note, bond, or written obligation, notwithstanding such note, bond or written obligation may include a greater rate of interest or discount than eight per cent. per annum, provided such obligations shall not bear more than eight per cent. interest per annum after their maturity.

Weaver v. Kearny & Blois, 326.

The evident object of the legislature in passing these acts was, that there should be no stipulation for interest exceeding the rate of eight per cent., unless the parties contracting for a greater rate of interest on a valid claim should add the interest to the claim in making the amount of the written obligation. It did not design that the usurious interest, included in a written obligation, stipulated for another debt, not included therein, should be collected.

Ibid.

BONDS.

See PRACTICE.

See EXECUTORS AND ADMINISTRATORS.

See COURTS.

BROKERS.

See PRINCIPAL AND AGENT.

See MANDATE.

CITATION.

See PRACTICE.

CLERKS OF COURT.

The clerk of a court has a right to demand security for the cost of the transcript of appeal. He is not forced to rely upon the uncertain security of an appeal bond.

The State v. Behrens, Clerk, &c., 67.

COMMON CARRIERS.

Any accident, except such as impossible to be foreseen or avoided, that may happen to any steamboat from running into or afoul of another boat; or, whenever an accident happens from the boat being overloaded, the owner of the boat causing such accident shall be responsible for all loss and damage as a common carrier, and also subject to fine and imprisonment.

Green et al. v. Croce et al., 3.

Where articles of greater value are packed in the same box with ordinary freight it does not change their character, and will not relieve the common carrier from liability for their loss, if those more valuable goods are not lost.

Hyde & Goodrich v. N. Y. & N. O. Steamship Co. 29.

Common carriers are not liable for damages occasioned by accidental and uncontrollable events.

Cochran & Hall v. Bark Cleopatra et als., 270.

COMMON CARRIERS, (*Continued.*)

Carriers or watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events.

Medina & Clohecy v. Hanson, 290.

The shipper is not bound to disclose the value of the goods, unless asked; but the carrier has the right to inquire, and to have a true answer; and, if deceived, he will not be responsible. If he make no inquiry and no artifice mislead him, he will be responsible for any loss, however great the value of the articles.

Levois v. Gale, Capt., and owners of ship R. D. Shepherd, 302.

See SHIPPING.

CONFLICT OF LAWS.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.

Burbank, Curator, v. Payne & Harrison, 15.

It is the deliberate opinion of this court that the powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions.

Ibid.

Fiduciary agents cannot transfer negotiable assets without an order of court.

Ibid.

Foreign laws must be proved as facts, and, in the absence of such proof, the rights of parties who claim, and the effect and validity of instruments executed under the laws of another State, must be determined by our own, which will be presumed the same.

Syme v. Stewart, 73.

Contracts are governed by the law of the place where they are entered into. The forms, the effects, and the prescription of actions are governed by the law of the place where they are brought. C. P. 13.

Pecquet v. Pecquet's Executor et al., 204.

An exception to the general rule, that a foreign law must be proved in our courts, is made when that law was once the law of this State.

Ibid.

The laws of France must be proved; because, having been abrogated as the prevailing general law of the province many years prior to our acquisition of Louisiana, and never thereafter adopted as such, we do not possess judicially the means of knowing what French laws in particular were retained by Spain, and handed down to us.

Ibid.

CONFLICT OF LAWS, (*Continued.*)

A sale which is valid by the laws of the country where it is made, is valid everywhere. The *lex loci contractus* must govern.

Fell v. Darden & Co., 236.

CONSTITUTION.

See APPEAL.

CONTINUANCE.

See COURTS.

See PRACTICE.

CONTRACTS.

Where there is no fixed price for a lease, or it be left to the award of a third person, unnamed and determined, the agreement was an essential ingredient to make it a legal contract.

Haughery v. Lee, 22.

Agreements will be construed by the acts of the parties making them.

Fregerio v. Mrs. Stillman, 23.

Suretyship is restrained within the limits expressed and intended by the contract.

Grieff & Co. v. Kirk et als. 25.

Where the parties to a contract, by mutual consent, enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol.

Leeds & Co. v. Fassman, 32.

A party must be put *in mora* in order to be made liable for a suit in damages on a contract. And this applies to the reconventional as well as to direct actions.

Ibid.

Where sub-contractors deliver defective work to the contractor, who receives it in that condition, and it causes damage to another, they will all be held liable *in solido* for the amount of the damage so caused.

Carey v. Courcelle et als., 108.

The city's acceptance of the work, for which it was authorized to contract, is *prima facie* evidence of its completion and mode of execution against the front proprietor, who becomes thereby bound.

City of New Orleans v. Ferriere et als., 183.

In contracts to be performed at a future period, the obligation which grows out of the contract arises at the very moment of making it, but the right of action growing out of it arises only when the stipulated term has arrived.

Ibid.

A proposition should always be interpreted *secundum subjectam materiam*.

Commercial Waterworks v. City of New Orleans, 190.

CONTRACTS, (*Continued.*)

When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both or by one, with the express or implied assent of the other, furnishes a rule for its interpretation. In a doubtful case the agreement is interpreted against him who has contracted the obligation.

Ibid.

Where there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action. So, where a defendant accepted and used a steamboat, without objection, he can still recover from the plaintiff damages in reconvention, on a contract unskillfully executed.

Conery v. Noyes, 201.

An obligation *in solido* is not presumed; it must be expressly stipulated. This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law.

Pecquet v. Pecquet's Executor et al., 204.

A person may, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.

Ibid.

Where a damaged article has been received and used by the contractor, knowingly, he cannot repudiate his contract, much less claim damages arising from injury sustained by its use.

Cazelar, Jr., v. Walker, 236.

Where a party comes into possession of property by *dation en paiement*, places his own clerk and other employees upon it, although he retains his transferrer as a manufacturer, the contract will be valid, and it cannot be seized for the debts of the latter.

Miltenberger & Co. v. Parker, Sheriff, et al., 254.

In an act of sale, a stipulation for another gives him, as to the sum due to him, all the rights and privileges which the vendor himself could exercise on the property sold.

Succession of Ferguson. 255.

Legal agreements having the effects of laws upon the parties, none but the parties can abrogate or modify them; and it is incumbent on courts to give legal effect to all such contracts, according to the true intent of all the parties.

Schmidt v. Barker, 261.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it, without any plea, at any stage of the

CONTRACTS, (*Continued.*)

proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and *in pari causa melior est conditio possidentis*.

Ibid.

Every condition of a thing impossible, or *contra bonos mores*, or prohibited by law, is null, and renders void the agreement which depends on it.

Ibid.

He who binds himself unwillingly, and under constraint, is not deemed, in the eye of the law, a participant in an illicit covenant.

Ibid.

If, from the plaintiff's own stating, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid.

Ibid.

The rule of law is *caveat emptor*; and, where a party purchases an article, on inspection, he cannot afterwards complain of the consequences of his own act.

Catharine McGuire, Tutrix, v. Kearny, Blois & Co., 295.

When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply those principles to determine what ought to be the incidents to a contract, which are required by equity.

Fassey v. The City of New Orleans, 299.

All agreements relative to personal property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved by at least one credible witness, and other corroborating circumstances.

Moore v. City of New Orleans, 312.

CORPORATIONS.

The statutes and regulations which corporations enact for their police and discipline, are obligatory upon all their respective members, who are bound to obey them, provided such statutes contain nothing contrary to the laws of public liberty, or to the interest of others.

German Evangelical Congregation of Lafayette v. Pressler, 127.

There is one principle common to the trustees of all incorporated churches. They have the possession and the custody of the temporalities of the church. They are considered *virtute officii* entitled to the possession, and are lawfully seized of the grounds, buildings and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their posses-

CORPORATIONS, (*Continued.*)

sion, and the courts are bound to protect them against every irregular and unlawful intrusion, made against their will, whether by the pastor, members of the congregation, or by strangers.

Ibid.

COSTS.

See APPEAL.

COURTS.

A judge may affix his signature to an order out of his territorial jurisdiction, where such an order can be granted in chambers, upon an *ex parte* application.

Succession of Weigel, 70.

Where an acting judge signed an order as "Judge of the Second District Court," omitting the word "judicial," *Held*: That it was sufficient.

Millaudon v. Davis, 85.

The reasoning and the opinion of a court upon a subject, on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by the decree of the court.

Davis v. Millaudon, agent, 97.

To recover damages plaintiff must make his claim certain; to make it only probable is not enough. But, when this is not done, the judgment below should not be final, but one of non-suit.

Smith v. Thielen, Exec'r, 239.

A party cannot be called into court and then have his capacity to stand in judgment questioned.

Baker v. Michinard, 251.

A judge cannot exercise his discretion relative to the time of the trial of cases. The legislature has established the terms of the courts. Neither can he refuse a judgment by default at the proper time; or grant a continuance, without the forms of law being strictly complied with. The judiciary is not invested by the constitution with legislative powers, and cannot deprive the citizen, by its rules, of his legal rights.

State, ex relatione of Tooreau, v. Hon. R. T. Posey, 252.

When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply those principles to determine what ought to be the incidents to a contract, which are required by equity.

Fassey v. The City of New Orleans, 299.

This court has only appellate jurisdiction. It is not vested with the power of correcting decrees of other courts, except on appeal. See Const. Art. 70.

The State ex rel. Gonegal v. Judge Third District Court of N. O. 328.

COURTS, (*Continued.*)

It has no authority to take original jurisdiction of the case, substitute its opinion for that of the judge of the lower court, and force him to pronounce its opinion, not his own, on the rights of the parties.

Ibid.

CRIMINAL LAW.

A bill of indictment for manslaughter will not lie unless brought within one year after the offence shall have been made known to the public officer having the power to direct the investigation.

The State v. Freeman et al., 69.

And so as regards all criminal offences, except wilful murder, arson, robbery, forgery and counterfeiting.

Ibid.

The only verdict, in a criminal case, that the jury can render, under the law, is a general one: a verdict of guilty or not guilty, which is a decision both on the law and the facts.

State v. Jurche, 71.

By the Court.—It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide; but they are not bound to do so. They have the right to judge of both the law and the facts in forming their verdict.

Ibid.

DAMAGES.

For the deprivation of the use and occupation of a store, on a claim for consequential damages, plaintiffs must establish the facts, and also the extent of damages suffered thereby.

Bromberg & Son v. Hyde & Goodrich, 18.

Employers are answerable for the damage occasioned by their servants, in the exercise of the functions in which they are employed.

Choppin v. N. O. & C. R. R. Co., 19.

Damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party.

Ibid.

Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it.

Durbridge v. Wentzel et al., 20.

Where the parties to a contract, by mutual consent, enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol.

Leeds & Co. v. Fassman, 32.

A party must be put *in mora* in order to be made liable for a suit in damages on a contract. And this applies to reconventional as well as to direct actions.

Ibid.

DAMAGES, (Continued.)

Malicious slander will be punished by damages, and the verdict of the jury and judgment of the court below sustained.

Mohrman v. Ohse, 64.

Where sub-contractors deliver defective work to the contractor, who receives it in that condition, and it causes damage to another, they will all be held liable *in solido* for the amount of the damage so caused.

Carey v. Courcelle et als., 111.

When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery, or damages, in case of the non-execution of the contract.

Seris v. Bellocq, Noblom & Co., 146.

If the object to be given is uncertain, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered.

Ibid.

Damages are properly assessed by the judge *a quo* at the time the defendants were put in default.

Ibid.

Where there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action. So, where a defendant accepted and used a steamboat, without objection, he can still recover from the plaintiff damages in reconvention, on a contract unskillfully executed.

Conery v. Noyes, 201.

Where a damaged article has been received and used by the contractor, knowingly, he cannot repudiate his contract, much less claim damages arising from injury sustained by its use.

Cazelar, Jr, v. Walker, 236.

The measure of damages is the amount of loss the plaintiff has sustained, and the profit of which he has been deprived, with the qualifications stated in Article 1928 C. C.

Smith v. Thielen, Ex'r., 239.

To recover damages plaintiff must make his claim certain; to make it only probable is not enough. But, when this is not done, the judgment below should not be final, but one of non-suit.

Ibid.

The act of 18th March, 1855, for a suit in damages, under Art. 2294, is a legal subrogation in favor of the persons there designated, to the right of action of the deceased sufferer, and the plaintiff must allege his cause of action as derived from the deceased.

Earhart v. N. O. & G. R. R. Co., 243.

DAMAGES, (Continued.)

Common carriers are not liable for damages occasioned by accidental and uncontrollable events.

Cochran & Hall v. Bark Cleopatra et als., 270.

No bailee is responsible for not insuring goods under his charge, unless he has instructions so to do.

Duncan v. Boye, 273.

Carriers or watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events.

Medina et al. v. Hanson, 290.

If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.

Foucher v. Choppin, 321.

DATION EN PAIEMENT.

Where a party comes into possession of property by *dation en paiement*, places his own clerk and other employees upon it, although he retains his transferrer as a manufacturer, the contract will be valid, and it cannot be seized for the debt of the latter.

Milttenberger & Co. v. Parker, Sheriff, et al., 254.

DEBTOR AND CREDITOR.

Article 2199 of the Civil Code applies when there is a solidarity as between the co-debtors; and can only be invoked when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged.

Lynch v. Leathers, et als., 118.

In the transfer of debts, rights or credits to third parties, the delivery takes place between the transferrer and transferee by the giving of the title.

Relf & Co. v. Boro, 258.

The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferee may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act.

Ibid.

The property of the debtor is always held liable to his creditors until a full and complete transfer and tradition is made to the purchaser.

Ibid.

DEFAULT.

See **CONTRACTS.**

See **SALE.**

See **PRACTICE.**

DEPOSIT.

A depository is not answerable, in any case, for acts produced by over-coming force ; such as fire, unless he failed to use proper diligence.

McCollum v. Porter et als. 89.

DOMICIL.

If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each appear to be nearly of the same nature, in such case, he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicil. This intention is proved by an express declaration of it before the judges of the parishes from which, and to which, he shall intend to remove. If this declaration is not made, this intention shall depend on circumstances.

Taylor v. Bach, 61.

DONATIONS.

No testament can have effect unless it has been presented to the judge of the parish in which he died, if he died within the State ; therefore, an executor in possession of a will has the right to have a nuncupative will registered and executed, although the estate had been fully administered and the property delivered into the possession of the legal heir. It is not necessary that he should, nor can he, resort to a direct action of nullity, until the testament is ordered to be executed.

The State v. The Judge of the Second District Court of N. O. 189.

If a donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects to be given, the donation, though not accepted in express terms, has full effect.

Pecquet v. Pecquet's Exr's et al. 204.

DOWRY.

See MARRIAGE.

See DONATION.

EMANCIPATION.

See SLAVES and STATU LIBERI.

EQUITY.

See COURTS.

ERROR OF LAW.

In order to entitle the payer to recover back money paid by mistake, it must have been paid to a person to whom he did not owe it. *Repetitio nulla est ab eo qui suum recepit.*

Sientes v. Odier & Co., 153.

EVIDENCE.

Where a witness is merely a nominal party to the suit, and disclaims any personal interest therein, he is competent.

Green et al. v. Croce et al., 3.

EVIDENCE, (*Continued.*)

A towboat's private book of rules and regulations cannot be received in evidence even when accompanied by oral testimony.

Ibid.

Where there is positive evidence of the loss of an instrument in writing, parol testimony will be received proving its contents.

Billen v. White, 10.

Where evidence was received without objection by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.

Kean v. Brandon et al., 37.

Evidence of fraud, etc., in an action on a policy of insurance, can only be admitted when specially pleaded; it is not admissible under the plea of the general issue.

Mrs. Flynn v. Merchants' Mutual Insurance Co., 135.

What third persons said out of court, and oral testimony of criminal proceedings, is not the best evidence, and inadmissible.

Ibid.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

Ibid.

Where the testimony, as to the amount of a certain portion of the goods destroyed, is vague and uncertain, that part will be reserved for further action.

Ibid.

The law requires the same amount of evidence to prove a verbal power of attorney as it does to prove a verbal contract for money or personal property; and that, when a party attempts to enforce a contract for the payment of money, above \$500, made by agent, he should prove, by at least one credible witness and other corroborating circumstances, the verbal agency.

Gardes et als. v. Schroeder & Schreiber, 142.

The whole tendency of modern practice is to enlarge the admissibility of evidence, leaving the court to restrict its applicability.

Kaiser v. New Orleans, 178.

Legal presumption is that which is attached, by a special law, to certain acts or to certain facts; such as the weight which the law attaches to the confession of the party, or to his oath.

Widow Betat et al. v. Mougin, 289.

The neglect or failure of one party to prove what is essential to his recovery, is not cured by the evidence of the other, leaving the fact doubtful.

Briggs v. Simonds, 294.

EVIDENCE, (*Continued.*)

All agreements relative to personal property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved by at least one credible witness, and other corroborating circumstances.

Moore v. City of New Orleans, 312.

EXECUTION OF JUDGMENT.

See WARRANTY.

N. O. v. Ferriere.

EXECUTORS AND ADMINISTRATORS.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.

Burbank, curator, v. Payne & Harrison, 15.

It is the deliberate opinion of this court that the powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions.

Ibid.

Fiduciary agents cannot transfer negotiable assets without an order of court.

Ibid.

The laws establishing the order of successions, and those which treat of their administration, are essentially different.

Succession of Lumsden, 38.

An inheritance remains without an heir and in abeyance until the rightful heir accepts or rejects it, according to the Article 1026, C. C., giving him time for deliberation. Such an heir has but a residuary interest. C. C. 1066.

Ibid.

EXECUTORY PROCESS.

The order of the court directing the executory process must be strictly in accordance with the authentic act; items not embraced therein will be stricken out, and the decree sustained for the express conditions of the mortgage.

Pele, Executor, v. Meaux, 58.

EXPROPRIATION.

See PUBLIC USE.

FRAUD.

A creditor of an insolvent debtor who opposes the appointment of syndic, or charges fraud against the debtor, must do so within ten days next following the meeting of creditors, by written opposition, before the court, stating specially the several facts of nullity of the

FRAUD, (Continued.)

appointment or fraud alleged against the insolvent debtor. Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender.

Nimick, McCloskey & Co. v. Ingram, 85.

The acceptance for the creditors by the court vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them; but any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim.

Ibid.

GARNISHEE.

Garnishees, being stakeholders, are liable only for the sum which they owe the defendants, and should not be made to pay interest until they are in default, as the garnishment process prohibits them from paying until ordered by the court. They are required to pay the attaching creditors only such sum as they may owe the defendants on a full and final settlement of their accounts.

Clark, Bros. & Co. v. Powell & Co. 177.

In the transfer of debts, rights or credits, to third parties, the delivery takes place between the transferrer and transferee by the giving of the title.

Relf & Co. v. Boro, 258.

The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferee may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act.

Ibid.

The property of the debtor is always held liable to his creditors until a full and complete transfer and tradition is made to the purchaser.

Ibid.

The creditors of a consignor can attach merchandize, or its proceeds, in the hands of the consignee, until the instructions, verbal or written, to pay the proceeds of sale to a third party have been communicated to, and the stipulation in his favor accepted by, him. The principle is, that the consignee must come under direct obligation to the assignee.

Ibid.

There is no such interest shown in a third party as to require him to be cited; nor to make it unsafe for garnishees to pay as ordered.

Ibid.

HUSBAND AND WIFE.

Where a married woman is separated from her husband in property, and doing business as a public merchant, she cannot plead that the draft accepted by her did not inure to her personal benefit.

Levy v. Rose, 113.

The judgment of separation of property is valid, although the wife fails to prove, when attacked by the creditors of the husband, that he was indebted to her for the full amount for which she obtained judgment against him. The creditor can then only contest the amount of her judgment.

Brown v. His Creditors, 113.

All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage, or to belong to her at the time of the marriage, is paraphernal.

Pecquet v. Pecquet's Executor et al., 204.

The wife has the right to administer personally her paraphernal property, without the assistance of her husband.

Ibid.

The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.

Ibid.

The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits, as above expressed.

Ibid.

All persons have the capability to contract, except those whose incapacity is specially declared by law. These are persons of insane mind, slaves, those who are interdicted, minors, married women.

Ibid.

The incapacity of the wife is removed by the authorization of the husband, or in cases provided by law, by that of the judge.

Ibid.

The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessities for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them.

Ibid.

The unauthorized contracts made by married women, like the acts of minors, may be made valid, after the marriage is dissolved, either by express or implied assent.

Ibid.

Where the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property whether natural, civil, or the result of labor, belong to the conjugal part-

HUSBAND AND WIFE, (Continued.)

nership, if there exist a community of gains. If there do not, each party enjoys as he chooses, that which comes to his hands; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.

Ibid.

The acknowledgment of a debt by the wife, without his express authority, will not bind the husband, unless she herself is a public merchant; nor can she bind herself for his debt by such an acknowledgment.

Bower & Garner v. Frindell and Wife, 299.

INJUNCTION.

An injunction is said to be a mandate obtained by plaintiff, prohibiting one from doing an act which, he contends, may be *injurious* to him, or *impair* a right which he claims. C. P. Art. 296. It is a conservatory act, an equitable remedy, which a party may obtain provisionally, on bringing his action. C. P. Art. 208. And, in order to obtain it, the party applying for the same must *state, under oath, the facts which, according to his belief, render an injunction necessary.*

Terry v. Stauffer, 306.

INSOLVENCY AND INSOLVENT PROCEEDINGS.

A sale of partnership property by one of the commercial partners, on the eve of his insolvency, is null and void, and will be set aside. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue each member, although without privilege.

Saloy, Syndic, v. Albrecht, 75.

The partnership is dissolved by the *cessio bonorum* made by one of its members; and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. If there is a surplus over the insolvent estate, it goes to his individual creditors.

Ibid.

A creditor of an insolvent debtor who opposes the appointment of syndic, or charges fraud against the debtor, must do so within ten days next following the meeting of creditors, by written opposition, before the court, stating specially the several facts of nullity of the appointment or fraud alleged against the insolvent debtor. Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender.

Nimick, McCloskey & Co. v. Ingram, 85.

The acceptance for the creditors by the court, vests in them all the rights and property of the insolvent, whether placed on the

INSOLVENCY AND INSOLVENT PROCEEDINGS, (*Continued.*)

schedule or not; and the syndic may sue to recover them; but any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim.

Ibid.

Where, in complicated accounts between the syndic and creditors, the court *a quo* appointed an umpire to decide, and an accountant to investigate the accounts, the judgment will be affirmed.

Diverges v. His Creditors, 112.

A creditor placed upon the *bilan* for more than is due to him, is not a fraudulent act of the debtor; particularly if not so charged in opposition.

Brown v. His Creditors, 113.

In cases of insolvency, all the ordinary debts, even those not due, are on an equality and must be paid proportionally.

Union Bank of Tennessee v. Bullitt, Miller & Co. 323.

INSURANCE.

Where an abandonment for a total loss is notified, by the master, to the underwriters, and accepted by their agent, it is binding, and passes the property to the insurers, if otherwise valid.

Graham & Boyle v. Ledda, 45.

The necessity for a sale of a vessel cannot be denied, when the peril, in the opinion of those capable of forming a judgment, make a loss probable, though the vessel may, a short time afterwards, get afloat.

Ibid.

The ratification of an abandonment to the agent of the underwriters dates back to the time of the act or contract ratified.

Ibid.

An insurance company will not be liable because the firewarden advised the removal of property from a burning building, and it was stolen during the transit.

Fernandez v. Merchants' Mutual Insurance Company, 131.

Evidence of fraud, etc., in an action on a policy of insurance, can only be admitted when specially pleaded; it is not admissible under the plea of the general issue.

Flynn v. Merchants' Mutual Insurance Company, 135.

What third persons said out of court, and oral testimony of criminal proceedings, is not the best evidence, and inadmissible.

Ibid.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

Ibid.

INSURANCE, (*Continued.*)

Where the testimony, as to the amount of a certain portion of the goods destroyed, is vague and uncertain, that part will be reserved for further action.

Ibid.

INTERPRETATION.

The words of a law are to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words; and, where its expressions are dubious, its true meaning is to be discovered by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

Dejona, f. v. c. v. Steamboat Osceola et als. 277

INTEREST.

Where the note sued on bears eight per cent. interest, no special damages will be allowed as for a frivolous appeal; and this court will simply affirm the judgment of the court below.

Harris v. Peel, 140.

Conventional interest will not be allowed on a contract unless expressly stipulated.

Stephens v. Beard, 145.

The holder of a note for the payment of money, according to the act approved March 20th, 1856, can only recover eight per cent. interest, notwithstanding the rate of interest agreed upon may be beyond eight per cent.

Williams v. Halsmith, 200.

The owner of any promissory note, bond, or written obligation, for payment of money to order, or bearer, or transferrable by assignment, shall have the right to collect the whole amount of such promissory note, bond or written obligation, notwithstanding such note, bond or written obligation may include a greater rate of interest or discount than eight per cent. per annum, provided such obligations shall not bear more than eight per cent. interest per annum after their maturity.

Weaver v. Kearny & Blois, 326.

The evident object of the legislature in passing these acts was, that there should be no stipulation for interest exceeding the rate of eight per cent., unless the parties contracting for a greater rate of interest on a valid claim should add the interest to the claim in making the amount of the written obligation. It did not design that the usurious interest, included in a written obligation, stipulated for another debt, not included therein, should be collected.

Ibid.

INTERROGATORIES ON FACTS AND ARTICLES.

The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or

INTERROGATORIES ON FACTS AND ARTICLES, (*Continued.*)

other disposition of such property may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. No other kind of questions are permitted.

Haughery v. Lee, 1.

Answers to interrogatories are not required to be made in any peculiar set phrases, so that they are responsive.

Ibid.

See EVIDENCE.

INTERVENTION.

See PRACTICE.

JUDGMENT.

Where there is not in the transcript of appeal either a final judgment, signed by the judge, or such interlocutory judgment as may work irreparable injury, the appeal will be dismissed, at the costs of the appellant.

North v. Leathers, 97.

A party cannot recover judgment on notes not yet due at the time of filing the petition, unless the affidavit is made in conformity to law.

Osborne & Tolle v. Powell & Co. 169.

JURIES AND JURORS.

The verdict of a jury will not be disturbed, except for good cause, and damages will be allowed on an appeal from a judgment thereon.

Field & Shackelford v. Campbell, 30.

The verdict of a jury, and consequent judgment thereupon, will not be disturbed, except for solid reasons.

Oliver v. Randolph, 50.

The only verdict, in a criminal case, that the jury can render, under the law, is a general one: a verdict of guilty or not guilty, which is a decision both on the law and the facts.

State v. Jurche, 71.

By the Court.—It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide; but they are not bound to do so. They have the right to judge of both the law and the facts in forming their verdict.

Ibid.

LAND TITLES.

If any one sells or alienates a piece of land, from one fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it give him a greater quantity of land than is called for in his title, and the surplus exceed the twentieth part of the quantity mentioned in his title.

Surgi v. Shooter et al. 68.

LAND TITLES, (*Continued.*)

There can be neither increase or diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary.

Ibid.

If one sells or alienates a piece of land, from one fixed boundary to another, the purchaser takes all the land between such bounds, although it gives him a greater quantity than his title calls for, and the surplus exceeds the twentieth part mentioned therein. Neither can there be increase or diminution on account of disagreement in measure.

Davis v. Millaudon, 97.

LETTING AND HIRING.

Where there is no fixed price for a lease, or it be left to the award of a third person, unnamed and determined, the agreement was an essential ingredient to make it a legal contract.

Haughery v. Lee, 22.

A lessee cannot dispute the title of his lessor.

Paquetel, wife of Gavot, v. Gauche, 63.

Where there is no special agreement as to the extent of the lease, it is presumed to be monthly.

Ibid.

Where threats and representations, resorted to by a party so that the other was induced to sign a lease and give his notes, which he paid for fear of suit; *Held:* That such threats as these are insufficient to rescind the contract. It is perfectly immaterial to the lessee what was the lessor's right or title to the thing leased. He got under his contract all that he could have acquired from the true owner, quiet and peaceable possession. Ownership is not essential to make a lease valid. He who lets out the property of another warrants the enjoyment of it against the claim of the owner.

Sientes v. Odier & Co, 153.

A lessee sued for rent, and in undisturbed possession of the premises under the lease, cannot contest the lessor's title.

Ibid.

In order to entitle the payer to recover back money paid by mistake, it must have been paid to a person to whom he did not owe it. *Repetitio nulla est ab eo qui suum recepit.*

Ibid.

Where the object of the lease was a special one, parol testimony cannot be received to prove that the lessee had the privilege of using it for other purposes.

Ibid.

A judicial sale of a lease imposes upon the purchaser the obligation of paying the price to the vendor, and that of paying the rent accruing after the sale, to the lessor, according to the terms of the lease, and this whether it is so announced in the advertisement or not.

Brinton, syndic, v. Madame Datas, 174.

LETTING AND HIRING, (Continued.)

The lessor has not the right to make any alteration in the thing let, during the continuance of the lease. In case of a breach of contract, by negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor.

Kaiser v. The City of New Orleans, 178.

If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.

Foucher v. Choppin, 321.

LIBEL AND SLANDER.

Malicious slander will be punished by damages, and the verdict of the jury and judgment of the court below sustained.

Mohrman v. Ohse, 64.

MANDATE.

A mandate must be express to sue out a writ of sequestration.

Lithgon & Co. v. Byrne, 8.

The mandatory, or attorney, is answerable for the interest of any sum of money he has employed to his own use, for the time he has so employed it; and for that of any sum remaining in his hands, from the day he become a defaulter by delaying to pay it over.

Millaudon v. Lesseps, 246.

MANDAMUS.

An exception that there was a misjoinder of parties and relators; that the petition shows no interest in, or cause of action on the part of either relator; and that the petition does not set forth and state such a case as would authorize the court to issue a *mandamus*, was properly overruled by the court *a quo*.

State v. Wrotnowski, 156.

By the Court.—*Mandamus* is necessarily a summary proceeding, and it is very questionable whether, in such a case, the intervention of third persons can be legally maintained.

Ibid.

Where the issuing of this writ would not be consonant with right and justice, or would serve no just or useful purpose, it should not be granted.

Ibid.

Where the appeal is taken within the usual delay, and security offered, a mandate will issue compelling the judge *a quo* to send up the appeal, if the case is not within the exceptions mentioned in Art. 580 of the Code of Practice.

The State v. The Judge of the 3d D. C. of N. O. 186.

MANDAMUS, (Continued.)

When a judge of an inferior court refuses to decide on the rights of litigants, this court cannot issue the mandate applied for to secure its appellate jurisdiction: nor when he decides adversely to the pretensions of a party. The reasons which he may give for his judgment cannot give this court original jurisdiction.

The State on the relation of Alter v. The Judge of 4th D. C. of N. O. 282.

Our jurisdiction is only appellate, and we cannot correct, except on appeal, the judgments of other courts. Const. Art. 70.

Ibid.

The legislature has provided the manner by which an appeal may be taken. It is not by *mandamus*.

Ibid.

A *mandamus* is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act, belonging to the place, duty, or quality with which it is clothed.

Terry v. Stauffer, 306.

MARRIAGE.

See HUSBAND AND WIFE.

MORTGAGES.

The failure to declare in the act of mortgage the exact amount of insurance, does not invalidate the act.

Pele, Executor v. Meaux, 58.

The order of the court directing the executory process must be strictly in accordance with the authentic act; items not embraced therein will be stricken out, and the decree sustained for the express conditions of the mortgage.

Ibid.

The act of mortgage is not a negotiable instrument; and, unlike the notes which it secures, when assigned, is subject to all equities between the original parties.

Bougliny v. Mme. Fortier et ux. 121.

In actions of revendication of real property, or when proceedings are instituted in order to obtain the seizure and sale of real property, the defendant may be cited either at the place where the property is situated, or where he has his domicile, at the option of the plaintiff.

Roman et als. v. Denny et als. 126.

There is no necessity for alleging or proving demand or protest of mortgage notes.

Ibid.

NEGOTIORUM GESTOR.

No man ought to be held responsible for the acts of another, done to his prejudice and against his will. Thus it is held in regard to the *negotiorum gestor*, that the latter must have intended to act in the interest of, and to manage the affairs of another, and not his own; and the management must have been useful at the time.

Woodlief & Legendre v. Moncure, 241.

NEW ORLEANS.

In the absence of proof to the contrary, it will be presumed that the city authorities have complied with all the formalities of the law in making a contract: *omnia præsumuntur solemniter esse acta*.

City of New Orleans v. Halpin, 185.

In the absence of proof of fraud, the acceptance by the corporation of work which it was authorized to contract for, is *prima facie* against the defendant, so far as it relates to its completion and the manner in which it was done.

Ibid.

See CONTRACTS.

OFFENCES AND QUASI-OFFENCES.

For the deprivation of the use and occupation of a store, on a claim for consequential damages, plaintiffs must establish the facts and also the extent of damages suffered thereby.

Bromberg & Son v. Hyde & Goodrich, 18.

Employers are answerable for the damage occasioned by their servants, in the exercise of the functions in which they are employed.

Choppin v. New Orleans & Carrollton R. R. Co. 19.

Damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party.

Ibid.

Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it.

Durbridge v. Wentzel et al. 20.

An insurance company will not be liable because the fire warden advised the removal of property from a burning building, and it was stolen during the transit.

Fernandez v. Merchants' Mutual Ins. Co. 131.

Masters and employers are answerable for the damages occasioned by their servants and overseers in the exercise of the functions in which they are employed.

Wichtrecht v. Fasnacht, 166.

PARTNERSHIP.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.

Villa v. Jonté et al. 9.

PARTNERSHIP, (*Continued.*)

Where a firm makes advances on consignments, they cannot be required to forward them to third persons subsequently, and thus be deprived of their privilege.

Bowker & Edmonds v. Connolly & Co. 12.

A silence of five years in the settlement of partnership accounts will bar any claim for balances.

Succession of Edward Parker, 28.

A sale of partnership property by one of the commercial partners, on the eve of his insolvency, is null and void, and will be set aside. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue each member, although without privilege.

Saloy, syndic, v. Albrecht, 75.

The partnership is dissolved by the *cessio bonorum* made by one of its members; and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. If there is a surplus over the insolvent estate, it goes to his individual creditors.

Ibid.

PLEADING.

Damages will be allowed for a frivolous appeal, when prayed for by the appellee in his answer.

Beaty v. Schwartz et als. 11.

Where the appellee does not claim damages *by his answer* for a frivolous appeal, none can be granted.

Cockburn v. Groves & Co. 18.

A motion to dismiss an appeal for informality must be made within three judicial days after the record is filed in this court.

Eupheme, f. v. c., et als. v. Maran et al. 21.

Where plaintiff fails to claim a balance of account he cannot have judgment therefor. The prayer of the petition is all that the court can decide upon.

Mackey v. Thompson, 65.

Where the record does not show a transfer of a right to the plaintiff, the case will be remanded.

Connell v. Brown, 111.

Where a married woman is separated from her husband in property, and doing business as a public merchant, she cannot plead that the draft accepted by her did not inure to her personal benefit.

Levy v. Rose, 13.

To obtain damages for a frivolous appeal the appellee must bring himself within the requirements of the law, and claim them in his answer.

Pecoul, Executor, v. De Mahy, 126.

PLEADING, (Continued.)

An exception that there was a misjoinder of parties and relators; that the petition shows no interest in, or cause of action on the part of either relator; and that the petition does not set forth and state such a case as would authorize the court to issue a *mandamus*, was properly overruled by the court *a quo*.

State v. Wrotnowski, 156.

By the Court.—*Mandamus* is necessarily a summary proceeding, and it is very questionable whether, in such a case, the intervention of third persons can be legally maintained.

Ibid.

If the appellee demand the reversal of any part of the judgment, or damages against the appellant, he must file his answer at least three days before that fixed for the argument, otherwise it shall not be received.

Barrett v. Donovan et al. 182.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it, without any plea, at any stage of the proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and *in pari causa melior est conditio possidentis*.

Schmidt v. Barker, 261.

Every condition of a thing impossible, or *contra bonos mores*, or prohibited by law, is null, and renders void the agreement which depends on it.

Ibid.

He who binds himself unwillingly, and under constraint, is not deemed, in the eye of the law, a participant in an illicit covenant.

Ibid.

If, from the plaintiff's own stating, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid.

Ibid.

PRACTICE.

A mandate must be express to sue out a writ of sequestration.

Lithgon & Co. v. Byrne, 8.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.

Villa v. Jonté et al. 9.

A co-defendant cannot be made a witness against the plaintiff.

Bell v. Black et al. 11.

A plaintiff must make out a clear case before a court of justice.

Ibid.

PRACTICE, (*Continued.*)

Where evidence was received without objection, by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.

Kean v. Wm. L. Brandon et al. 37.

If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each appear to be nearly of the same nature, in such case, he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicil. This intention is proved by an express declaration of it before the judges of the parishes from which, and to which, he shall intend to remove. If this declaration is not made, this intention shall depend on circumstances.

Taylor v. Bach, 61.

If a new trial be prayed for on account of the misconduct of the adverse party, or other causes, the party must accompany his motion by an affidavit of the facts he relies upon.

Paquetel, wife of Gavot, v. Gauche, 63.

Where plaintiff fails to claim a balance of account he cannot have judgment therefor. The prayer of the petition is all that the court can decide upon.

Mackey v. Thompson, 65.

Where a party is guilty of laches by not urging his claim in due time and place, he cannot complain in this court.

Tibben v. Gratia & Co. et al. 72.

Where a judgment bears eight per cent. interest only five per cent. damages will be allowed for a frivolous appeal.

Lamothe v. Lamarque, 77.

Where the appellee moved to dismiss the appeal, that the case having been tried by a jury, no motion was made for a new trial, *Held:* That it is a good reason to affirm the judgment, but cannot be to dismiss the appeal.

Lafrance v. Martin, 77.

It is not necessary that more than one of the principals and the surety shall sign an appeal bond.

Ibid.

Where parties are not shown to have been in actual or constructive possession, as owners, of the property at the time it was attached, they have not the right to bond it.

Letchford & Co. v. Jacobs, 79.

The intervention may stand, although the motion to bond by the intervenors be dismissed.

Ibid.

An error of calculation, patent on the face of the record, made in the court below, will be corrected on appeal without suggestion.

Moores & Co. v. McConnell, 84.

PRACTICE, (*Continued.*)

Where an acting judge signed an order as "Judge of the Second District Court," omitting the word "judicial;" *Held*: That it was sufficient.

Millaudon v. Davis, 85.

Citation being the essential ground of all civil actions, in ordinary proceeding, the neglect of that formality annuls radically all proceedings had, unless the defendants have voluntarily appeared in the suit and answered the demand.

McCan & Harrell v. Steamer Golden Age, et als. 91.

A tender, in open court, of the thing demanded, is an admission that the thing itself is due, and is therefore, inconsistent with the averment that the thing is not due; neither can defendant withdraw his tender subsequently, so as to effect any rights the plaintiff may have acquired under it.

Davis v. Millaudon, 97.

The plea of payment is inconsistent with a general denial, consequently a plea of tender.

Ibid.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings, and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but, where such tender is made, *not of the thing claimed, but of something else*, with a special reservation (if not accepted) of all legal rights, and with the special defence that the thing claimed is not actually due, it has not that conclusive effect.

Ibid.

Article 2199 of the Civil Code applies when there is a solidarity as between the co-debtors; and can only be invoked when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged.

Lynch v. Leathers et al. 118.

A citation of appeal to this court, from a judgment rendered by a justice of the peace, must be issued as if it had been rendered in a District court, otherwise the appeal will be dismissed.

The Mayor et al. of Carrollton v. Gaillard, 120.

Where documents offered in evidence below are not to be found on the record, the appeal will be dismissed.

Hall v. Beggs et als. 130.

Damages for a frivolous appeal must be asked for in the answer of the appellee.

Frost v. Garret & Wynne, et als. 134.

Heirs, while they are not concluded by a tableau of distribution, have yet the right to appear and oppose it.

Succession of Barbour, 133.

PRACTICE, (*Continued.*)

A rule is not the proper mode to dispose of an opposition, when excepted to.

Ibid.

Any amendment of the judgment in the court below must be prayed for in the answer to the appeal; it will not be noticed in the brief.
Hite v. Barker, 141.

Until goods have been received and reshipped, or until the receiver had notified the eventual consignees that they would be forwarded according to instructions, they must be considered as under the control of the receiver, and, of course, liable to attachment by their creditors.

Von Phul et als. v. Powell & Co. 165.

The article 522 C. P. is directory, and a substantial compliance with its provisions will be sustained, if the verdict is not objected to at the trial by the defendants.

Wichtrecht v. Fasnacht, 166.

Where no interest is given by the verdict, the judgment should give none.

Ibid.

Where no evidence appears on the face of the record to show why a rule taken to set aside an injunction against an order of seizure and sale should not be made absolute, the judgment of the lower court to that effect will be affirmed.

Mrs. Wheeler v. Stewart, 167.

Where the note sued on bears eight per cent. interest, and the judgment below is for the same rate of interest, no damages will be accorded as for a frivolous appeal.

Saloy v. Gubernator et al. 169.

A party cannot recover judgment on notes not yet due at the time of filing the petition, unless the affidavit is made in conformity to law.

Osborne & Tolle v. Powell & Co. 169.

Where the defendant is cited personally, and as president of a company, and answers for himself alone, there is no issue joined, and the case will be remanded.

City of Jefferson v. Kaiser et al. 176.

The right of either party to a bill of exceptions is reserved to the court, and the court is to pass upon the admissibility of the evidence.

Pecquet v. Pecquet's Executor et al. 204.

The only mode pointed out by law, to test, in this court, the correctness of the opinions of inferior courts, is by bill of exceptions, and in no other form can it revise such opinions. It is only when the question decided is presented by the pleadings that a bill of exceptions may be dispensed with.

Ibid.

PRACTICE, (Continued.)

Contracts are governed by the law of the place where they are entered into. The forms, the effects, and the prescription of actions are governed by the law of the place where they are brought. C. P. 13.

Ibid.

An exception to the general rule, that a foreign law must be proved in our courts, is made when that law was once the law of this State.

Ibid.

The laws of France must be proved; because, having been abrogated as the prevailing general law of the province many years prior to our acquisition of Louisiana, and never thereafter adopted as such, we do not possess judicially the means of knowing what French laws in particular were retained by Spain, and handed down to us.

Ibid.

A *dilatory exception*, as for instance a premature suit, might have been successfully urged in *limine litis*, but cannot avail a party after a judgment by default.

Ibid.

No appeal will lie, except as regards minors, after a year has expired, to be computed from the day on which the final judgment was rendered.

Hall v. Beggs, 238.

A second appeal may be granted when the first has been dismissed without a decision on its merits.

Ibid.

Where an appeal was *taken* in the court *a quo*, the fact that no appellate court existed would not interrupt the prescription. It might be otherwise if there had been no judge in the lower court to grant an appeal.

Ibid.

A party cannot be called into court and then have his capacity to stand in judgment questioned.

Baker v. Michinard, 251.

A judge cannot exercise his discretion relative to the time of the trial of cases. The legislature has established the terms of the courts. Neither can he refuse a judgment by default at the proper time; or grant a continuance, without the forms of law being strictly complied with. The judiciary is not invested by the constitution with legislative powers, and cannot deprive the citizen, by its rules, of his legal rights.

State ex relatione of Tooreau v. Hon. R. T. Posey, 252.

A defendant must be sued at the place of his domicile, *in personam*, unless he voluntarily submits to the jurisdiction of the court where suit is brought against him.

Dejona, f. w. c. v. Steamboat Osceola et als. 277.

The capacity of the plaintiff to stand in judgment must be pleaded in *limine litis*.

Ibid.

PRACTICE, (Continued.)

A writ of provisional seizure will lie against a boat running exclusively within the State, for services rendered on board.

Ibid.

The neglect or failure of one party to prove what is essential to his recovery, is not cured by the evidence of the other, leaving the fact doubtful.

Briggs v. Simonds, 294.

When the creditors of a succession, or an insolvent estate, who have an important interest in maintaining a judgment, have not been cited, nor their citation asked for by appellant, the appeal will be dismissed.

Succession of Constance Perret, 302.

The writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office in a corporation, inquiring by what authority he claims or holds such office. Art. 868, C. P. This mandate is only issued for the decision of disputes between parties, in relation to the offices in corporations, as when a person usurps the character of mayor of a city, and such like.

Terry v. Stauffer, 306.

A *mandamus* is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act, belonging to the place, duty, or quality with which it is clothed.

Ibid.

An injunction is said to be a mandate obtained by plaintiff, prohibiting one from doing an act which, he contends, may be *injurious* to him, or *impair* a right which he claims. C. P. Art. 296. It is a conservatory act, an equitable remedy, which a party may obtain provisionally, on bringing his action. C. P. Art. 208. And, in order to obtain it, the party applying for the same must *state, under oath, the facts which, according to his belief, render an injunction necessary.*

Ibid.

By intervening and bonding property attached, the intervenor has relieved it from the lien of attachment, and removed it from the jurisdiction of the court, consequently he is bound as surety for whatever judgment may be rendered against the defendant, which is the tenor of his bond. He cannot, therefore, be heard to construe his obligation so as to defeat the law.

Ledda v. Captain Maumus et als. 314.

The statute of 20th March, 1839, amendatory of Art. 259 C. P., restricts the judgment to be obtained to the surety on the bond, and does not contemplate a proceeding, by that mode, against the principal.

Ibid.

PRACTICE, (Continued.)

The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. C. P. Art. 895. If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, *as containing all the testimony adduced*, the Supreme Court can only judge of such cause on a statement of facts prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception to the opinion of the judge, or on a special verdict; and, in the absence of all these, it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following Articles. (896-7.)

Kearny v. Nixon et als. 318.

One, whether a party or stranger to the cause, may appeal from a final judgment, if he alleges that he is aggrieved thereby; and, from an interlocutory judgment, when such judgment may cause him an irreparable injury; provided the amount or value in dispute is sufficient, and the party is not debarred by his own act from taking an appeal.

State ex relatione Mead v. Judge of the Third Judicial District, 320.

PRESCRIPTION.

A silence of five years in the settlement of partnership accounts will bar any claim for balances.

Succession of Edward Parker, 28.

Prescription does not begin to run until from the time of eviction.

Friedlander v. Bell, 42.

In general, all personal actions, except those expressly enumerated, are prescribed by ten years, if the creditor be present, and twenty years, if he be absent.

Millaudon v. Lesseps, 246.

The claim of an agent against his principal for services is not embraced in the words "open accounts," which, by the statute of 1852, are prescribed against in three years. Ten years is the only prescription against such a demand.

Ibid.

The plea in compensation has a retroactive effect from the time when the plaintiff and defendant became indebted to each other. Hence, the plea of prescription must be overruled where the debts existed simultaneously.

Ibid.

Where, after five years had elapsed from the maturity of notes, a party makes provision for their payment in an act of sale, it is a tacit renunciation of prescription. He acknowledges their binding effect on providing for their payment.

Succession of Ferguson, 255.

PRESCRIPTION, (*Continued.*)

In a redhibitory action the prescription of one year does not apply, except from the date of the discovery of the vice; and then not in the case of an absentee against whom no process could issue within that period. *Contra non valentem agere non currit prescriptis.*

Murphy v. Gutierrez, 271.

The acknowledgment of a debt by the wife, without his express authority, will not bind the husband, unless she herself is a public merchant; nor can she bind herself for his debt by such an acknowledgment.

Bower & Garner v. Frindell and Wife, 299.

PRINCIPAL AND AGENT.

A mandate must be express to sue out a writ of sequestration.

Lithgon & Co. v. Byrne, 8.

Fiduciary agents cannot transfer negotiable assets without an order of court.

Burbank, Curator, v. Payne & Harrison, 15.

The acquiescence of the principal in the conduct of the agent, is a clear ratification of his action.

Featherston v. Graham & Buckingham, 42.

The law requires the same amount of evidence to prove a verbal power of attorney as it does to prove a verbal contract for money or personal property; and that, when a party attempts to enforce a contract for the payment of money, above \$500, made by agent, he should prove, by at least one credible witness and other corroborating circumstances, the verbal agency.

Gardes et als. v. Schroeder & Schreiber, 142.

No man ought to be held responsible for the acts of another done to his prejudice and against his will. Thus it is held in regard to the *negotiorum gestor*, that the latter must have intended to act in the interest of, and to manage the affairs of another, and not his own; and the management must have been useful at the time.

Woodlief & Legendre v. Moncure, 241.

The claim of an agent against his principal for services is not embraced in the words "open accounts," which, by the statute of 1852, are prescribed against in three years. Ten years is the only prescription against such a demand.

Millaudon v. Lesseps, 246.

The mandatory, or attorney, is answerable for the interest of any sum of money he has employed to his own use, for the time he has so employed it; and for that of any sum remaining in his hands, from the day he become a defaulter by delaying to pay it over.

Ibid.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGE.

Where a firm makes advances on consignments they cannot be required to forward them to third persons subsequently, and thus be deprived of their privilege.

Bowker & Edmonds v. Connolly & Co. 12.

See PRACTICE.

PUBLIC OFFICERS.

The Secretary of State cannot go behind commissions officially presented to him for authentication. Neither will this court go behind a commission to inquire into the evidence on which it was issued.

Terry v. Stauffer, 306.

It is the duty of the Governor to fill vacancies. In elective offices he cannot remove an incumbent; but the appointment to fill a vacancy does not operate a removal of the previous incumbent, because no removal can so be made; the office is vacant, or it is not vacant; if it is vacant, it is properly filled by the last appointment; if it is not vacant, the first incumbent cannot be disturbed.

Ibid.

With regard to offices of a public nature, that is, which are conferred in the name of the State, by the Governor, with or without the consent of the Senate, the usurpations of them are prevented and punished in the manner directed by the penal code.

Ibid.

PUBLIC USE.

Where a road, once dedicated to public use, has since ceased to be used for public purposes, and is not required by front proprietors thereon, its soil reverts to the owners.

Mendez et al. v. Dugart, 171.

A charter granted in consideration of water supplied for public purposes will not be construed so as to apply to quasi-public purposes, such as for the city hall, etc. A "public" purpose is for the universal public, and not a portion of it.

Commercial Water Works v. City of N. O. 190.

QUO WARRANTO.

The writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office in a corporation, inquiring by what authority he claims or holds such office. Art. 868, C. P. This mandate is only issued for the decisions of disputes between parties, in relation to the offices in corporations, as when a person usurps the character of mayor of a city, and such like.

Terry v. Stauffer, 306.

RATIFICATION.

See PRINCIPAL AND AGENT.

RECONVENTION.

Where evidence was received without objection, by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.

Kean v. Wm. L. Brandon et al. 37.

Where the judge of the court below gives judgment for the plaintiff, but makes no allusion to the plea in reconvention, set up by the defendant, it is an irregularity, and the case will be remanded.

Sientes v. Odier & Co. 153.

See DAMAGES.

REDHIBITION.

The exclusion of warranty in a sale cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects, not apparent in the things sold, when he knows of their existence; and the vendee is not precluded, by such exclusion, from showing that at, and previous to the time and date, the vendor was aware of the existence of redhibitory defects, and fraudulently concealed them.

Huntington v. Brown, 48.

Although it be agreed that the seller is not subject to any warranty, he is, however, accountable for whatever results from his personal acts, and any contrary stipulation is void. His silence will not avail him, when he does not disclose infirmities.

Ibid.

Redhibition is called the avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

Coulon v. Semmes et al. 119.

RES JUDICATA.

The reasoning and the opinion of a court upon a subject, on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by the decree of the court.

Davis v. Millaudon, Agent, 97.

ROADS AND LEVEES.

See PUBLIC USE.

SALE.

The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or other disposition of such property may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. No other kind of questions are permitted.

Haughery v. Lee, 1.

SALE, (*Continued.*)

Answers to interrogatories are not required to be made in any peculiar set phrases, so that they are responsive.

Ibid.

The exclusion of warranty in a sale cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects, not apparent in the things sold, when he knows of their existence; and the vendee is not precluded, by such exclusion, from showing that at, and previous to the time and date, the vendor was aware of the existence of redhibitory defects, and fraudulently concealed them.

Huntington v. Brown, 48.

Although it be agreed that the seller is not subject to any warranty, he is, however, accountable for whatever results from his personal acts, and any contrary stipulation is void. His silence will not avail him, when he does not disclose infirmities.

Ibid.

At a sale *à la folle enchère* when the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made the latter remains a debtor to his vendor for the deficiency, and for expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudicated, the first purchaser has no claim for the excess. The vendor can prosecute the vendee for a specific compliance with the terms of the sale, as for damages, by an ordinary action, or proceed to a resale at the risk of the vendee. This last remedy is a severe one, and must come clearly within the provisions of the law.

Miltenerberger v. Hill et als. 52.

If one sells or alienates a piece of land, from one fixed boundary to another, the purchaser takes all the land between such bounds, although it gives him a greater quantity than his title calls for, and the surplus exceeds the twentieth part mentioned therein. Neither can there be increase or diminution on account of disagreement in measure.

Davis v. Millaudon, 97.

Redhibition is called the avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

Coulon v. Semmes et al. 119.

Parol testimony cannot be received to establish a contract of sale of immovables, or show damages resulting from the non-compliance of the vendor in refusing to pass the act of sale. Even a promise to sell must be proved in writing.

Halsmith v. Cusday, 140.

SALE, (Continued.)

When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery, or damages, in case of the non-execution of the contract.

Seris v. Bellocq, Noblom & Co. 146.

If the object to be given is uncertain, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered.

Ibid.

Damages are properly assessed by the judge *a quo* at the time the defendants were put in default.

Ibid.

A sale which is valid by the laws of the country where it is made, is valid everywhere. The *lex loci contractus* must govern.

Fell v. Darden & Co. 236.

The rule of law is *caveat emptor*; and where a party purchases an article, on inspection, he cannot afterwards complain of the consequences of his own act.

Catharine McGuire, tutrix, v. Kearny, Blois & Co. 295.

SALE, JUDICIAL.

If a sheriff sell anything, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter must indemnify the former.

Friedlander v. Bell et al. 42.

At a sale *a la folle enchère*, when the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to his vendor for the deficiency, and for expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudicated, the first purchaser has no claim for the excess. The vendor can prosecute the vendee for a specific compliance with the terms of the sale, as for damages, by an ordinary action, or proceed to a re-salé at the risk of the vendee. This last remedy is a severe one, and must come clearly within the provisions of the law.

Milttenberger v. Hill et als. 52.

Where a debtor waives an appraisement, when called upon by the sheriff, of a sale of his property on *fi. fa.*, and purchases part of the property himself, he cannot complain of the irregularity of the proceedings.

Desplate v. St. Martin et als. 91.

SALE, JUDICIAL, (Continued.)

A judicial sale of a lease imposes upon the purchaser the obligation of paying the price to the vendor, and that of paying the rent, accruing after the sale, to the lessor, according to the terms of the lease; and this whether it is so announced in the advertisement or not.

Brinton, syndic, v. Madame Datas, 174.

SEIZURE AND SALE.

In actions of revendication of real property, or when proceedings are instituted in order to obtain the seizure and sale of real property, the defendant may be cited either at the place where the property is situated, or where he has his domicil, at the option of the plaintiff.

Roman et als. v. Denney et als. 126.

There is no necessity for alleging or proving demand or protest of mortgage notes.

Ibid.

An appeal will lie from a judgment on a rule in the court below dismissing an opposition to an order of seizure and sale.

Heft v. Kelty, 143.

SEQUESTRATION.

Where a suit is commenced by a writ of sequestration, the judgment of the court below should have been *in rem* alone, reserving to the plaintiffs their right to an action *in personam*.

Peterson v. Williard, 93.

See PRACTICE.

SERVITUDE.

Where a road, once dedicated to public use, has since ceased to be used for public purposes, and is not required by front proprietors, thereon, its soil reverts to the owners.

Mendez et al. v. Dugart, 171.

SHERIFF.

If a sheriff sell anything, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter must indemnify the former.

Friedlander v. Bell et al. 42.

Where a debtor waives an appraisalment, when called upon by the sheriff, of a sale of his property on *fi. fa.*, and purchases part of the property himself, he cannot complain of the irregularity of the proceedings.

Desplate v. Martin et als. 91.

SHIPPING.

Any accident, except such as impossible to be foreseen or avoided, that may happen to any steamboat from running in or afoul of another boat; or, whenever an accident happens from the boat being over-

SHIPPING, (Continued.)

loaded, the owner of the boat causing such accident shall be responsible for all loss and damage as a common carrier and also subject to fine and imprisonment.

Green et al v. Croce et al. 3.

In a contract of affreightment, where the defendants expressly allege and clearly prove that the damage to goods was caused by stress of weather and dangers of the sea, beyond their control, they will not be held liable.

Letchford et al. v. Ship Golden Eagle et als. 9.

Where articles of greater value are packed in the same box with ordinary freight, it does not change their character, and will not relieve the common carrier from liability for their loss, if those more valuable goods are not lost.

Hyde & Goodrich v. N. Y. & N. O. Steamship Co. 29.

Where freight is received without objection or protest, on the part of defendant, it is too late to dispute the legality of plaintiff's claim.

Marcy et al. v. Warner & Co. 34.

Where an abandonment for a total loss is notified, by the master, to the underwriters, and accepted by their agent, it is binding, and passes the property to the insurers, if otherwise valid.

Graham & Boyle v. Leida, 45.

The necessity for a sale of a vessel cannot be denied, when the peril, in the opinion of those capable of forming a judgment, make a loss probable, though the vessel may, a short time afterwards, get afloat.

Ibid.

A bill of lading can have no effect until its delivery to the consignee.

Ibid.

The ratification of an abandonment to the agent of the underwriters dates back to the time of the act or contract ratified.

Ibid.

The shipper is not bound to disclose the value of the goods, unless asked; but the carrier has the right to inquire, and to have a true answer; and, if deceived, he will not be responsible. If he make no inquiry and no artifice mislead him, he will be responsible for any loss, however great the value of the articles.

Levois v. Gale, Captain, and owners of ship R. D. Shepherd, 302.

See COMMON CARRIERS.

SIMULATION.

See SALE.

SLAVES AND STATU LIBERI.

Persons holding a slave under a precarious title in Alabama can not obtain a remedy in our courts.

Hall v. McLauren, 35.

SLAVES AND STATU LIBERI, (Continued.)

The slave who has acquired the right of being free at a future time, is, from that time, capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.

Succession of Chappel, 174.

SOLIDARITY.

See **CONTRACTS.**

STATUTES.

Where a statute has been repealed since the rendition of a judgment, inflicting a penalty, in the court *a quo*, this court cannot affirm it.

Mouras v. Schooner Brewer, Captain et als. 82.

Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning; and this rule is no less applicable to contracts than to laws. See Art. 1943 C. C.

The Commercial Bank of N. O. v. The City of N. O. 190.

The usage under a statute is its best interpreter.

Ibid.

SUBROGATION.

See **SURETY.**

SUCCESSIONS.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.

Burbank, curator, v. Payne & Harrison, 15.

The laws establishing the order of successions, and those which treat of their administration, are essentially different.

Succession of Lumsden, 38.

An inheritance remains without an heir and in abeyance until the rightful heir accepts or rejects it, according to the Article 1026, C. C., giving him time for deliberation. Such an heir has but a residuary interest. C. C. 1066.

Ibid.

Heirs, while they are not concluded by a tableau of distribution, have yet the right to appear and oppose it.

Succession of Barbour, 133.

A rule is not the proper mode to dispose of an opposition, when excepted to.

Ibid.

SUCCESSIONS, (*Continued.*)

The slave who has acquired the right of being free at a future time, is, from that time, capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.
Succession of Chappel, 174.

SURETY.

Suretyship is restrained within the limits expressed and intended by the contract.

Grieff & Co. v. Kirk et als. 25.

Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not.

Pecquet v. Pecquet's Executor et al. 204.

Under the provisions of our law the contract of suretyship is of a mixed character.

Ibid.

The obligation of the surety is to pay the whole debt; but this solidarity is tempered by the right of division. The right, however, vests in *facultate*.

Ibid.

The surety has the right to demand the division: but until the right is exercised the obligation is solidary.

Ibid.

The suretyship cannot exceed what may be due by the debtor, nor be contracted under more onerous conditions.

Ibid.

It may be contracted for a part of the debt only, or under more favorable conditions.

Ibid.

The suretyship which exceeds the debt, or which is contracted under more onerous conditions, shall not be void, but shall be reduced to the conditions of the principal obligation.

Ibid.

A man may be surety without the order or even the knowledge of the person for whom he becomes surety.

Ibid.

Subrogation takes place of right for the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it.

Ibid.

By intervening and bonding property attached, the intervenor has relieved it from the lien of attachment, and removed it from the jurisdiction of the court; consequently, he is bound as surety for

SURETY, (Continued.)

whatever judgment may be rendered against *the defendant*, which is the tenor of his bond. He cannot, therefore, be heard to construe his obligation so as to defeat the law.

Ledda v. Captain Maumus et als. 314.

The statute of 20th March, 1839, amendatory of Art. 259 C. P. restricts the judgment to be obtained to the surety on the bond, and does not contemplate a proceeding, by that mode, against the principal.

Ibid.

TAXES, TAX SALES AND TAX COLLECTORS.

The usufructuary is liable, during his enjoyment, to all the annual charges, to which the things subject to the usufruct may be liable.

Coleman v. Poydras Asylum, 325.

He is obliged to pay all taxes and contributions imposed on the property subject to the usufruct, as well as all ground rents which may have been charged upon the property, previous to the commencement of the usufruct.

Ibid.

TENDER.

A tender, in open court, of the thing demanded, is an admission that the thing itself is due, and is, therefore, inconsistent with the averment that the thing is not due; neither can defendant withdraw his tender subsequently, so as to affect any rights the plaintiff may have acquired under it.

Davis v. Millaudon, 97.

The plea of payment is inconsistent with a general denial, consequently a plea of tender.

Ibid.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings, and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but, where such tender is made, *not of the thing claimed, but of something else*, with a special reservation (if not accepted) of all legal rights, and with the special defence that the thing claimed is not actually due, it has not that conclusive effect.

Ibid.

TRUST AND TRUSTEES.

The statutes and regulations which corporations enact for their police and discipline, are obligatory upon all their respective members, who are bound to obey them, provided such statutes contain nothing contrary to the laws of public liberty, or to the interest of others.

German Evangelical Congregation of Lafayette v. Pressler, 127.

There is one principle common to the trustees of all incorporated churches. They have the possession and the custody of the tem-

TRUST AND TRUSTEES, (*Continued.*)

poralities of the church. They are considered *virtute officii* entitled to the possession, and are lawfully seized of the grounds, buildings, and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion, made against their will, whether by the pastor, members of the congregation, or by strangers.

Ibid.

USAGE.

See COMMON CARRIERS.

See SHIPPING.

USUFRUCT.

The usufructuary is liable, during his enjoyment, to all the annual charges, to which the things subject to the usufruct may be liable.
Coleman v. Poydras Asylum, 325.

He is obliged to pay all taxes and contributions imposed on the property subject to the usufruct, as well as all ground rents which may have been charged upon the property, previous to the commencement of the usufruct.

Ibid.

The usufructuary is also bound, during his enjoyment, to cause to be made and repaired the roads, bridges, ditches, levees and the like, for which the estate of which he has the usufruct, may be liable.

Ibid.

With respect to extraordinary or temporary charges, which may be imposed on things subject to the usufruct during its pendency, the usufructuary is bound to support them, unless they are of a nature to augment the value of the property subject to the usufruct.

Ibid.

In this last case the usufructuary is bound to pay them, and shall be reimbursed by the owner at the termination of the usufruct, for the capital expended only.

Ibid.

USURY.

See INTEREST.

WARRANTY.

Execution of a judgment against a warrantor will be suspended until the warrantee shall have paid the amount thereof to the plaintiff.
City of New Orleans v. Ferriere et als. 183.

WILLS.

No testament can have effect unless it has been presented to the judge of the parish in which he died, if he died within the State; therefore, an executor in possession of a will has the right to have a nuncupative will registered and executed, although the estate had been fully administered and the property delivered into the possession of the legal heir. It is not necessary that he should, nor can he, resort to a direct action of nullity, until the testament is ordered to be executed.

The State v. The Judge of the Second District Court of N. O. 189.

If a donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects to be given, the donation, though not accepted in express terms, has full effect.

Pecquet v. Pecquet's Executors et als. 204.

WITNESS.

Where a witness is merely a nominal party to the suit, and disclaims any personal interest therein, he is competent.

Green et al. v. Crose et al. 3.

A towboat's private book of rules and regulations cannot be received in evidence even when accompanied by oral testimony.

Ibid.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.

Villa v. Jonté et al. 9.

A co-defendant cannot be made a witness against the plaintiff.

Bell v. Black et al. 11.

Parol testimony cannot be received to establish a contract of sale of immovables, or show damages resulting from the non-compliance of the vendor in refusing to pass the act of sale. Even a promise to sell must be proved in writing.

Halsmith v. Castay. 140.

APPENDIX

APPENDIX.

APPENDIX

CONSTITUTION OF THE STATE OF LOUISIANA.

ADOPTED IN CONVENTION, JULY 23, 1864.

PREAMBLE.

We, the people of the State of Louisiana, do ordain and establish this Constitution.

TITLE I.

EMANCIPATION.

Article 1. Slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are hereby forever abolished and prohibited throughout the State.

Art. 2. The Legislature shall make no law recognizing the right of property in man.

TITLE II.

DISTRIBUTION OF POWERS.

Art. 3. The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them shall be confined to a separate body of magistracy, to-wit: those which are legislative to one, those which are executive to another, and those which are judicial to another.

CONSTITUTION OF THE STATE OF LOUISIANA.

Art. 4. No one of these departments, nor any person holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

TITLE III.

LEGISLATIVE DEPARTMENT.

Art. 5. The legislative power of the State shall be vested in two distinct branches, the one to be styled "the House of Representatives," the other "the Senate," and both "the General Assembly of the State of Louisiana."

Art. 6. The members of the House of Representatives shall continue in service for the term of two years from the day of the closing of the general elections.

Art. 7. Representatives shall be chosen on the first Monday in November every two years, and the election shall be completed in one day. The General Assembly shall meet annually on the first Monday in January, unless a different day be appointed by law, and their sessions shall be held at the seat of government. There shall also be a session of the General Assembly in the city of New Orleans, beginning on the first Monday of October, eighteen hundred and sixty-four; and it shall be the duty of the governor to cause a special election to be held for members of the General Assembly, in all the parishes where the same may be held, on the day of the election for ratification or rejection of this Constitution—to be valid in case of ratification; and in other parishes or districts he shall cause elections to be held as soon as it may become practicable, to fill the vacancies for such parishes or districts in the General Assembly. The term of office of the first General Assembly shall expire as though its members had been elected on the first Monday of November, eighteen hundred and sixty-three.

Art. 8. Every duly qualified elector under this Constitution shall be eligible to a seat in the General Assembly; *Provided*, that no person shall be a representative or senator unless he be, at the time of his election, a duly qualified voter of the representative or senatorial district from which he is elected.

Art. 9. Elections for the members of the General Assembly shall be held at the several election precincts established by law.

Art. 10. Representation in the House of Representatives shall be equal and uniform, and shall be regulated and ascertained by the number of qualified electors. Each parish shall have at least one representative. No new parish shall be created with a territory less than six hundred and twenty-five square miles, nor with a number of electors less than the full number entitling it to a representative; nor when the creation of such new parish would leave any other parish without the full extent of territory and number of electors. The first enumeration by the State authorities, under this Constitution, shall be made in the year eighteen hundred and sixty-six, the second in the year eighteen hundred and seventy, the

third in the year eighteen hundred and seventy-six; after which time the General Assembly shall direct in what manner the census shall be taken, so that it be made at least once in every period of ten years for the purpose of ascertaining the total population, and the number of qualified electors in each parish and election district; and in case of informality, omission or error in the census returns from any district, the Legislature shall order a new census taken in such parish or election district.

Art. 11. At the first session of the Legislature after the making of each enumeration, the Legislature shall apportion the representation amongst the several parishes and election districts on the basis of qualified electors as aforesaid. A representative number shall be fixed, and each parish and election district shall have as many representatives as the aggregate number of its electors will entitle it to, and an additional representative for any fraction exceeding one-half the representative number. The number of representatives shall not be more than one hundred and twenty nor less than ninety.

Art. 12. Until an apportionment shall be made, and elections held under the same, in accordance with the first enumeration to be made, as directed in Article 10, the representation in the Senate and House of Representatives shall be as follows:

For the parish of Orleans, forty-four representatives, to be elected as follows:

First Representative District.....	3	For the Parish of Iberville.....	1
Second ".....	5	" West Baton Rouge....	1
Third ".....	7	" East Baton Rouge....	2
Fourth ".....	3	" West Feliciana.....	1
Fifth ".....	4	" East Feliciana.....	1
Sixth ".....	2	" Washington.....	1
Seventh ".....	3	" St. Helena.....	1
Eighth ".....	3	" Vermillion.....	1
Ninth ".....	4	" Lafayette.....	2
Tenth ".....	8	" St. Landry.....	4
Orleans, Right Bank.....	2	" Calcasieu.....	2
For the Parish of Livingston.....	1	" Avoyelles.....	2
" St. Tammany.....	1	" Rapides.....	3
" Pointe Coupée.....	1	" Natchitoches.....	2
" St. Martin.....	2	" Sabine.....	1
" Concordia.....	1	" Caddo.....	2
" Madison.....	1	" DeSoto.....	2
" Franklin.....	1	" Ouachita.....	1
" St. Mary.....	1	" Union.....	2
" Jefferson.....	3	" Morehouse.....	1
" Plaquemines.....	1	" Jackson.....	2
" St. Bernard.....	1	" Caldwell.....	1
" St. Charles.....	1	" Catahoula.....	2
" St. John the Baptist.....	1	" Claiborne.....	3
" St. James.....	1	" Bossier.....	1
" Ascension.....	1	" Bienville.....	2
" Assumption.....	3	" Carroll.....	1
" Lafourche.....	3	" Tensas.....	1
" Terrebonne.....	2	" Winn.....	2
Total.....	118		

And the State shall be divided into the following senatorial districts:

All that portion of the parish of Orleans lying on the left bank of the Mississippi river shall be divided into two senatorial districts; the First and Fourth Districts of the city of New Orleans shall compose one district, and shall elect five senators; and the Second and Third Districts of said city shall compose the other district, and shall elect four senators.

The parishes of Plaquemines, St. Bernard and all that part of the parish of Orleans on the right bank of the Mississippi river shall form one district, and shall elect one senator.

The parish of Jefferson shall form one district, and shall elect one senator.

The parishes of St. Charles and Lafourche shall form one district, and shall elect one senator.

The parishes of St. John the Baptist and St. James shall form one district, and shall elect one senator.

The parishes of Ascension, Assumption and Terrebonne shall form one district, and shall elect two senators.

The parish of Iberville shall form one district, and shall elect one senator.

The parish of East Baton Rouge shall form one district, and shall elect one senator.

The parishes of West Baton Rouge, Pointe Coupée and West Feliciana shall form one district, and shall elect two senators.

The parish of East Feliciana shall form one district, and shall elect one senator.

The parishes of Washington, St. Tammany, St. Helena and Livingston shall form one district, and shall elect one senator.

The parishes of Concordia and Tensas shall form one district, and shall elect one senator.

The parishes of Madison and Carroll shall form one district, and shall elect one senator.

The parishes of Morehouse, Ouachita, Union and Jackson shall form one district, and shall elect two senators.

The parishes of Catahoula, Caldwell and Franklin shall form one district, and shall elect one senator.

The parishes of Bossier, Bienville, Claiborne and Winn shall form one district, and shall elect two senators.

The parishes of Natchitoches, Sabine, DeSoto and Caddo shall form one district, and shall elect two senators.

The parishes of St. Landry, Lafayette and Calcasieu shall form one district, and shall elect two senators.

The parishes of St. Martin and Vermillion shall form one district, and shall elect one senator.

The parish of St. Mary shall form one district, and shall elect one senator.

CONSTITUTION OF THE STATE OF LOUISIANA.

v

The parishes of Rapides and Avoyelles shall form one district, and shall elect two senators.

Art. 13. The House of Representatives shall choose its speaker and other officers.

Art. 14. Every white male who has attained the age of twenty-one years, and who has been a resident of the State twelve months next preceding the election, and the last three months thereof in the parish in which he offers to vote, and who shall be a citizen of the United States, shall have the right of voting.

Art. 15. The Legislature shall have power to pass laws extending suffrage to such other persons, citizens of the United States, as by military service, by taxation to support the government, or by intellectual fitness, may be deemed entitled thereto.

Art. 16. No voter, on removing from one parish to another within the State, shall lose the right of voting in the former until he shall have acquired it in the latter. Electors shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to or returning from elections.

Art. 17. The Legislature shall provide by law that the names and residence of all qualified electors shall be registered in order to entitle them to vote; but the registry shall be free of cost to the elector.

Art. 18. No pauper, no person under interdiction, nor under conviction of any crime punishable with hard labor, shall be entitled to vote at any election in this State.

Art. 19. No person shall be entitled to vote at any election held in this State, except in the parish of his residence, and, in cities and towns divided into election precincts, in the election precinct in which he resides.

Art. 20. The members of the Senate shall be chosen for the term of four years. The Senate, when assembled, shall have the power to choose its own officers.

Art. 21. The Legislature, in every year in which they apportion representation in the House of Representatives, shall divide the State into senatorial districts.

Art. 22. No parish shall be divided in the formation of a senatorial district, the parish of Orleans excepted. And whenever a new parish shall be created, it shall be attached to the senatorial district from which most of its territory was taken, or to another contiguous district, at the discretion of the Legislature; but shall not be attached to more than one district. The number of senators shall be thirty-six; and they shall be apportioned among the senatorial districts according to the electoral population contained in the several districts: *Provided*, that no parish be entitled to more than nine senators.

Art. 23. In all apportionments of the Senate, the electoral population of the whole State shall be divided by the number thirty-six, and the

result produced by this division shall be the senatorial ratio entitling a senatorial district to a senator. Single or contiguous parishes shall be formed into districts, having a population the nearest possible to the number entitling a district to a senator; and if in the apportionment to make a parish or district fall short of or exceed the ratio, then a district may be formed having not more than two senators, but not otherwise. No new apportionment shall have the effect of abridging the term of service of any senator already elected at the time of making the apportionment. After an enumeration has been made as directed in the 10th article, the Legislature shall not pass any law until an apportionment of representation in both Houses of the General Assembly be made.

Art. 24. At the first session of the General Assembly, after this Constitution takes effect, the senators shall be equally divided by lot into two classes; the seats of the senators of the first class shall be vacated at the expiration of the term of the first House of Representatives; of the second class at the expiration of the term of the second House of Representatives; so that one-half shall be chosen every two years, and a rotation thereby kept up perpetually. In case any district shall have elected two or more senators, said senators shall vacate their seats respectively at the end of the term aforesaid, and lots shall be drawn between them.

Art. 25. The first election for senators shall be held at the same time that the election for representatives is held; and thereafter there shall be elections of senators at the same time with each general election of representatives, to fill the places of those senators whose term of service may have expired.

Art. 26. Not less than a majority of the members of each House of the General Assembly shall form a quorum to do business; but a smaller number may adjourn from day to day, and shall be authorized by law to compel the attendance of absent members.

Art. 27. Each House of the General Assembly shall judge of the qualifications, elections and return of its members; but a contested election shall be determined in such a manner as shall be directed by law.

Art. 28. Each House of the General Assembly may determine the rules of its proceeding, punish a member for disorderly behavior, and, with a concurrence of two-thirds, expel a member; but not a second time for the same offence.

Art. 29. Each House of the General Assembly shall keep and publish weekly a journal of its proceedings; and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal.

Art. 30. Each House may punish, by imprisonment, any person not a member, for disrespectful and disorderly behavior in its presence, or for obstructing any of its proceedings. Such imprisonment shall not exceed ten days for any one offence.

Art. 31. Neither House, during the sessions of the General Assembly,

shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.

Art. 32. The members of the General Assembly shall receive from the public treasury a compensation for their services, which shall be eight dollars per day, during their attendance, going to and returning from the sessions of their respective Houses. The compensation may be increased or diminished, by law, but no alteration shall take effect during the period of service of the members of the House of Representatives by whom such alteration shall have been made. No session shall extend to a period beyond sixty days, to date from its commencement, and any legislative action had after the expiration of the said sixty days, shall be null and void. This provision shall not apply to the first Legislature which is to convene after the adoption of this Constitution.

Art. 33. The members of the General Assembly shall in all cases, except treason, felony, breach of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses, and going to or returning from the same; and for any speech or debate in either House shall not be questioned in any other place.

Art. 34. No senator or representative shall, during the term for which he was elected, nor for one year thereafter, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased during the time such senator or representative was in office, except to such offices as may be filled by the election of the people.

Art. 35. No person, who at any time may have been a collector of taxes, whether State, parish or municipal, or who may have been otherwise entrusted with public money, shall be eligible to the General Assembly, or to any office of profit or trust, under the State government, until he shall have obtained a discharge for the amount of such collections, and for all public moneys with which he may have been entrusted.

Art. 36. No person, while he continues to exercise the functions of a clergyman of any religious denomination whatever, shall be eligible to the General Assembly.

Art. 37. No bill shall have the force of a law until, on three several days, it be read over in each House of the General Assembly, and free discussion allowed thereon; unless in case of urgency, four-fifths of the House, where the bill shall be pending, may deem it expedient to dispense with this rule.

Art. 38. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose amendments, as in other bills: *Provided*, they shall not introduce any new matter, under the color of an amendment, which does not relate to raising revenue.

Art. 39. The General Assembly shall regulate, by law, by whom, and in what manner, writs of election shall be issued to fill the vacancies which may happen in either branch thereof.

Art. 40. The Senate shall vote on the confirmation or rejection of the officers, to be appointed by the governor with the advice and consent of the Senate, by yeas and nays; and the names of the senators voting for and against the appointments, respectively, shall be entered on a journal to be kept for that purpose, and made public at the end of each session, or before.

Art. 41. Returns of all elections for members of the General Assembly shall be made to the secretary of state.

Art. 42. In the year in which a regular election for a senator of the United States is to take place, the members of the General Assembly shall meet in the hall of the House of Representatives on the second Monday following the meeting of the Legislature, and proceed to said election.

TITLE IV.

EXECUTIVE DEPARTMENT.

Art. 43. The supreme executive power of the State shall be vested in a chief magistrate, who shall be styled the governor of the State of Louisiana. He shall hold his office during the term of four years, and, together with the lieutenant governor, chosen for the same term, be elected as follows: The qualified electors for representatives shall vote for governor and lieutenant governor at the time and place of voting for representatives; the returns of every election shall be sealed up and transmitted by the proper returning officer to the secretary of State, who shall deliver them to the speaker of the House of Representatives on the second day of the session of the General Assembly then to be holden. The members of the General Assembly shall meet in the House of Representatives to examine and count the votes. The person having the greatest number of votes for governor shall be declared duly elected; but if two or more persons shall be equal and the highest in the number of votes polled for governor, one of them shall immediately be chosen governor by joint vote of the members of the General Assembly. The person having the greatest number of votes polled for lieutenant governor shall be lieutenant governor; but if two or more persons shall be equal and highest in the number of votes polled for lieutenant governor, one of them shall be immediately chosen lieutenant governor by joint vote of the members of the General Assembly.

Art. 44. No person shall be eligible to the office of governor or lieutenant governor who shall not have attained the age of thirty-five years, and been a citizen and resident within the State for the period of five years next preceding his election.

Art. 45. The governor shall enter on the discharge of his duties on the second Monday of January next ensuing his election, and shall continue in office until the Monday next succeeding the day that his successor

shall be declared duly elected, and shall have taken the oath or affirmation required by the Constitution.

Art. 46. No member of Congress, minister of any religious denomination, or any person holding office under the United States government, shall be eligible to the office of governor or lieutenant governor.

Art. 47. In case of impeachment of the governor, his removal from office, death, refusal or inability to qualify, resignation or absence from the State, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term, or until the governor, absent or impeached, shall return or be acquitted. The Legislature may provide by law for the case of removal, impeachment, death, resignation, disability or refusal to qualify, of both the governor and the lieutenant governor, declaring what officer shall act as governor, and such officer shall act accordingly, until the disability be removed, or for the remainder of the term.

Art. 48. The lieutenant governor or officer discharging the duties of governor, shall, during his administration, receive the same compensation to which the governor would have been entitled had he continued in office.

Art. 49. The lieutenant governor shall, by virtue of his office, be president of the Senate, but shall have only a casting vote therein. Whenever he shall administer the government, or shall be unable to attend as president of the Senate, the senators shall elect one of their own members as president of the Senate for the time being.

Art. 50. The governor shall receive for his services a compensation of eight thousand dollars per annum, payable quarterly, on his own warrant.

Art. 51. The lieutenant governor shall receive for his services a salary of five thousand dollars per annum, to be paid quarterly.

Art. 52. The governor shall have power to grant reprieves for all offences against the State, and, except in cases of impeachment, shall, with the consent of the Senate, have power to grant pardons, remit fines and forfeitures, after conviction. In cases of treason, he may grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested.

Art. 53. He shall be commander-in-chief of the militia of this State, except when they shall be called into the service of the United States.

Art. 54. He shall nominate, and, by and with the advice and consent of the Senate, appoint all officers whose offices are established by the Constitution, and whose appointments are not herein otherwise provided for: *Provided*, however, that the Legislature shall have a right to prescribe the mode of appointment to all other offices established by law.

Art. 55. The governor shall have power to fill vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session thereof, unless otherwise provided

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for in this Constitution ; but no person who has been nominated for office and rejected by the Senate, shall be appointed to the same office during the recess of the Senate.

Art. 56. He may require information, in writing, from the officers in the executive department upon any subject relating to the duties of their respective offices.

Art. 57. He shall, from time to time, give to the General Assembly information respecting the situation of the State, and recommend to their consideration such measures as he may deem expedient.

Art. 58. He may, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place if that should have become dangerous from an enemy or from epidemic ; and, in case of disagreement between the two Houses as to the time of adjournment, he may adjourn them to such time as he may think proper, not exceeding four months.

Art. 59. He shall take care that the laws are faithfully executed.

Art. 60. Every bill which shall have passed both Houses shall be presented to the governor ; if he approves, he shall sign it, if not, he shall return it with his objections to the House in which it originated, which shall enter the objections at large upon its journal, and proceed to consider it ; if, after such consideration, two-thirds of all the members elected to that House shall agree to pass the bill, it shall be sent, with the objections, to the other House, by which it shall be likewise considered, and if approved by two-thirds of the members elected to that House, it shall be a law ; but in such cases the vote of both Houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it ; unless the General Assembly, by adjournment, prevents its return.

Art. 61. Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on a question of adjournment, shall be presented to the governor, and before it shall take effect, be approved by him, or, being disapproved, shall be repassed by two-thirds of the members elected to each House of the General Assembly.

Art. 62. There shall be a secretary of state, who shall hold his office during the term for which the governor shall have been elected. The records of the State shall be kept and preserved in the office of the secretary ; he shall keep a fair register of the official acts and proceedings of the governor, and when necessary shall attest them ; he shall, when required, lay the said register, and all papers, minutes and vouchers relative to his office, before either House of the General Assembly, and shall perform such other duties as may be enjoined on him by law.

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Art. 63. There shall be a treasurer of the State, and an auditor of public accounts, who shall hold their respective offices during the term of four years.

Art. 64. The secretary of state, treasurer of state and auditor of public accounts shall be elected by the qualified electors of the State; and in case of any vacancy caused by the resignation, death or absence of the secretary, treasurer or auditor, the governor shall order an election to fill said vacancy.

Art. 65. The secretary of state, the treasurer and the auditor shall receive a salary of five thousand dollars per annum each.

Art. 66. All commissions shall be in the name and by the authority of the State of Louisiana, and shall be sealed with the State seal and signed by the governor.

Art. 67. All able-bodied men in the State shall be armed and disciplined for its defence.

Art. 68. The militia of the State shall be organized in such manner as may be hereafter deemed most expedient by the Legislature.

TITLE V.

JUDICIARY DEPARTMENT.

Art. 69. The judiciary power shall be vested in a Supreme Court, in such inferior courts as the Legislature may, from time to time, order and establish, and in justices of the peace.

Art. 70. The Supreme Court, except in cases hereafter provided, shall have appellate jurisdiction only; which jurisdiction shall extend to all cases when the matter in dispute shall exceed three hundred dollars; to all cases in which the constitutionality or legality of any tax, toll or impost whatsoever, or of any fine, forfeiture or penalty imposed by a municipal corporation shall be in contestation; and to all criminal cases on questions of law alone whenever the offence charged is punishable with death or imprisonment at hard labor, or when a fine exceeding three hundred dollars is actually imposed.

Art. 71. The Supreme Court shall be composed of one chief justice and four associate justices, a majority of whom shall constitute a quorum. The chief justice shall receive a salary of seven thousand five hundred dollars, and each of the associate justices a salary of seven thousand dollars, annually, until otherwise provided by law. The court shall appoint its own clerks.

Art. 72. The Supreme Court shall hold its sessions in New Orleans from the first Monday in the month of November to the end of the month of June, inclusive. The Legislature shall have the power to fix the sessions elsewhere during the rest of the year; until otherwise provided, the sessions shall be held as heretofore.

Art. 73. The Supreme Court, and each of the judges thereof, shall have power to issue writs of *habeas corpus*, at the instance of all persons in actual custody under process, in all cases in which they may have appellate jurisdiction.

Art. 74. No judgment shall be rendered by the Supreme Court without the concurrence of a majority of the judges comprising the court. Whenever the majority cannot agree, in consequence of the recusation of any member of the court, the judges not recused shall have power to call upon any judge or judges of the inferior courts, whose duty it shall be, when so called upon, to sit in the place of the judge or judges recused, and to aid in determining the case.

Art. 75. All judges, by virtue of their office, shall be conservators of the peace throughout the State. The style of all process shall be "the State of Louisiana." All prosecutions shall be carried on in the name and by the authority of the State of Louisiana, and conclude against the peace and dignity of the same.

Art. 76. The judges of all courts within the State shall, as often as it may be advisable so to do, in every definitive judgment, refer to the particular law in virtue of which such judgment may be rendered, and in all cases adduce the reasons on which their judgment is founded.

Art. 77. The judges of all courts shall be liable to impeachment; but for any reasonable cause, which shall not be sufficient ground for impeachment, the governor shall remove any of them, on the address of a majority of the members elected to each House of the General Assembly. In every such case the cause or causes for which such removal may be required shall be stated at length in the address, and inserted in the journal of each House.

Art. 78. The judges both of the Supreme and inferior courts shall receive a salary which shall not be diminished during their continuance in office; and they are prohibited from receiving any fees of office or other compensation than their salaries for any civil duties performed by them.

Art. 79. The judges of the Supreme Court shall be appointed by the governor, by and with the advice and consent of the Senate, for a term of eight years; the judges of the inferior courts for a term of six years.

Art. 80. The clerks of the inferior courts shall be elected by the qualified voters of their several districts, and shall hold their offices during a term of four years.

Art. 81. The Legislature shall have power to vest in clerks of courts authority to grant such orders and do such acts as may be deemed necessary for the furtherance of the administration of justice, and in all cases the powers thus granted shall be specified and determined.

Art. 82. The jurisdiction of justices of the peace shall not exceed, in civil cases, the sum of one hundred dollars, exclusive of interest, subject to appeal in such cases as shall be provided for by law. They shall be

elected by the qualified voters of their several districts, and shall hold their office during a term of two years. They shall have such criminal jurisdiction as shall be provided by law.

Art. 83. There shall be an attorney general for the State, and as many district attorneys as the Legislature shall find necessary. The attorney general shall be elected every four years by the qualified voters of the State. He shall receive a salary of five thousand dollars per annum, payable on his own warrant quarterly. The district attorneys shall be elected by the qualified voters of their respective districts, for a term of four years. They shall receive such salaries as shall be provided by the Legislature.

Art. 84. A sheriff and a coroner shall be elected in each parish by the qualified voters thereof, who shall hold their offices for the term of two years. The Legislature shall have the power to increase the number of sheriffs in any parish. Should a vacancy occur in either of these offices subsequent to an election, it shall be filled by the governor, and the person so appointed shall continue in office until his successor shall be elected and qualified.

TITLE VI.

IMPEACHMENT.

Art. 85. The power of impeachment shall be vested in the House of Representatives.

Art. 86. Impeachments of the governor, lieutenant governor, attorney general, secretary of state, state treasurer, auditor of public accounts, and the judges of the inferior courts, justices of the peace excepted, shall be tried by the Senate; the chief justice of the Supreme Court, or the senior judge thereof, shall preside during the trial of such impeachment. Impeachments of the judges of the Supreme Court shall be tried by the Senate. When sitting as a court of impeachment, the senators shall be upon oath or affirmation, and no person shall be convicted without the concurrence of a majority of the senators elected.

Art. 87. Judgments in case of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under the State; but the convicted parties shall, nevertheless, be subject to indictment, trial and punishment, according to law.

Art. 88. All officers against whom articles of impeachment may be preferred, shall be suspended from the exercise of their functions during the pendency of such impeachment; the appointing power may make a provisional appointment to replace any suspended officer until the decision of the impeachment.

Art. 89. The Legislature shall provide by law for the trial, punishment and removal from office of all other officers of the State by indictment or otherwise.

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TITLE VII.

GENERAL PROVISIONS.

Art. 90. Members of the General Assembly and all officers, before they enter upon the duties of their offices, shall take the following oath or affirmation :

" I, (A B), do solemnly swear (or affirm) that I will support the Constitution and laws of the United States, and of this State, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as —, according to the best of my abilities and understanding, so help me God."

Art. 91. Treason against the State shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or his own confession in open court.

Art. 92. The Legislature shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

Art. 93. Every person shall be disqualified from holding any office of trust or profit, in this State, and shall be excluded from the right of suffrage, who shall have been convicted of treason, perjury, forgery, bribery or other high crimes or misdemeanors.

Art. 94. All penalties shall be proportioned to the nature of the offence.

Art. 95. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

Art. 96. No money shall be drawn from the treasury but in pursuance of specific appropriation made by law; nor shall any appropriation of money be made for a longer term than two years. A regular statement and account of the receipts and expenditures of all public moneys shall be published annually, in such manner as shall be prescribed by law.

Art. 97. It shall be the duty of the General Assembly to pass such laws as may be proper and necessary to decide differences by arbitration.

Art. 98. All civil officers of the State at large shall be voters of, and reside within the State; and all district or parish officers shall be voters of, and reside within their respective districts or parishes, and shall keep their offices at such places therein as may be required by law.

Art. 99. All civil officers shall be removable by an address of a majority of the members elected to both Houses, except those the removal of whom has been otherwise provided by this Constitution.

Art. 100. In all elections by the people, the vote shall be taken by ballot; and in all elections by the Senate and House of Representatives, jointly or separately, the vote shall be given *viva voce*.

Art. 101. No member of Congress, nor person holding or exercising any office of trust or profit under the United States, or under any foreign power, shall be eligible as a member of the General Assembly, or hold or exercise any office of trust or profit under the State.

Art. 102. None but citizens of the United States shall be appointed to any office of trust or profit in this State.

Art. 103. The laws, public records and the judicial and legislative written proceedings of the State shall be promulgated, preserved and conducted in the language in which the Constitution of the United States is written.

Art. 104. No power of suspending the laws of this State shall be exercised, unless by the Legislature or by its authority.

Art. 105. Prosecutions shall be by indictment or information. The accused shall have a speedy public trial, by an impartial jury of the parish in which the offence shall have been committed. He shall not be compelled to give evidence against himself; he shall have the right of being heard by himself or counsel; he shall have the right of meeting the witnesses face to face, and shall have compulsory process for obtaining witnesses in his favor. He shall not be twice put in jeopardy for the same offence.

Art. 106. All persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great; or, unless after conviction for any offence or crime punishable with death or imprisonment at hard labor. The privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it.

Art. 107. Excessive bail shall not be required; excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

Art. 108. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

Art. 109. No *ex post facto* or retroactive law, nor any law impairing the obligations of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made.

Art. 110. All courts shall be open; and every person, for any injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without denial or unreasonable delay.

Art. 111. The press shall be free; every citizen may freely speak, write and publish his sentiments on all subjects—being responsible for an abuse of this liberty.

Art. 112. The Legislature shall not have power to grant aid to companies or associations of individuals, except to charitable associations, and to such companies or associations as are and shall be formed for the exclusive purpose of making works of internal improvement, wholly or partially within the State, to the extent only of one-fifth of the capital of such companies, by subscription of stock or loan in money or public bonds; but any aid thus granted shall be paid to the company only in the same proportion as the remainder of the capital shall be actually paid in by the stockholders of the company; and, in case of loan, such adequate security shall be required as to the Legislature may seem proper. No corporation or individual association, receiving the aid of the State as herein provided, shall possess banking or discounting privileges.

Art. 113. No liability shall be contracted by the State as above mentioned, unless the same be authorized by some law for some single object or work, to be distinctly specified therein, which shall be passed by a majority of the members elected to both Houses of the General Assembly; and the aggregate amount of debts and liabilities incurred under this and the preceding article shall never, at any time, exceed eight millions of dollars.

Art. 114. Whenever the Legislature shall contract a debt exceeding in amount the sum of one hundred thousand dollars, unless in case of war, to repel invasion, or suppress insurrection, they shall, in the law creating the debt, provide adequate ways and means for the payment of the current interest and of the principal when the same shall become due. And the said law shall be irrepealable until principal and interest are fully paid and discharged, or unless the repealing law contains some other adequate provision for the payment of the principal and interest of the debt.

Art. 115. The Legislature shall provide by law for all change of venue in civil and criminal cases.

Art. 116. The Legislature shall have the power to license the selling of lottery tickets and the keeping of gambling houses: said houses in all cases shall be on the first floor and kept with open doors; but in all cases not less than ten thousand dollars per annum shall be levied as a license or tax on each vendor of lottery tickets, and on each gambling house, and five hundred dollars on each tombola.

Art. 117. The Legislature may enact general laws regulating the adoption of children, emancipation of minors, changing of names, and the granting of divorces; but no special laws shall be enacted relating to particular or individual cases.

Art. 118. Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title.

Art. 119. No law shall be revived or amended by reference to its title; but in such case the act revived, or section amended, shall be re-enacted and published at length.

Art. 120. The Legislature shall never adopt any system or code of laws by general reference to such system or code of laws; but in all cases shall specify the several provisions of the laws it may enact.

Art. 121. Corporations shall not be created in this State by special laws except for political or municipal purposes; but the Legislature shall provide by general law for the organization of all other corporations, except corporations with banking or discounting privileges, the creation, renewal or extension of which is hereby prohibited.

Art. 122. In case of the insolvency of any bank or banking association, the bill holders thereof shall be entitled to preference in payment over all other creditors of such bank or association.

Art. 123. No person shall hold or exercise, at the same time, more than one civil office of trust or profit, except that of justice of the peace.

Art. 124. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes. The General Assembly shall levy an income tax upon all persons pursuing any occupation, trade or calling, and all such persons shall obtain a license, as provided by law. All tax on income shall be pro rata on the amount of income or business done.

Art. 125. The Legislature may provide by law in what case officers shall continue to perform the duties of their offices until their successors shall have been inducted into office.

Art. 126. The Legislature shall have power to extend this Constitution and the jurisdiction of this State over any territory acquired by compact with any State, or with the United States, the same being done by consent of the United States.

Art. 127. None of the lands granted by Congress to the State of Louisiana for aiding in constructing the necessary levees and drains, to reclaim the swamp and overflowed lands of the State, shall be diverted from the purposes for which they were granted.

Art. 128. The Legislature shall pass no law excluding citizens of this State from office for not being conversant with any language except that in which the Constitution of the United States is written.

Art. 129. No liability, either State, parochial or municipal, shall exist for any debts contracted for, or in the interest of the rebellion against the United States government.

Art. 130. The seat of government shall be and remain at New Orleans, and shall not be removed without the consent of a majority of both Houses of the General Assembly.

Art. 131. The Legislature may determine the mode of filling vacancies in all offices for which provision is not made in this Constitution.

Art. 132. The Legislature shall pass no law requiring a property qualification for office.

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TITLE VIII.

CORPORATION OF THE CITY OF NEW ORLEANS.

Art. 133. The citizens of the city of New Orleans shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the mode of elections which shall be prescribed by the Legislature; *Provided*, that the mayor and recorders shall be ineligible to a seat in the General Assembly; and the mayor and recorders shall be commissioned by the governor as justices of the peace, and the Legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor offences, and as the police and good of said city may require.

The city of New Orleans shall maintain a police which shall be uniformed with distinction of grade, to consist of permanent citizens of the State of Louisiana, to be selected by the mayor of the city, and to hold office during good behavior, and removable only by a police commission composed of five citizens and the mayor, who shall be president of the board. The commission to be appointed by the governor of the State for the term of two years, at a salary of not less than one thousand dollars per annum; a majority of whom shall remove for delinquencies. Members of the police when removed shall not again be eligible to any position on the police for a term of one year.

Interfering or meddling in elections in any manner will be a sufficient cause for instant dismissal from the police by the board.

The chief of police shall give a penal bond in the sum of ten thousand dollars; lieutenants of police, five thousand dollars; sergeants and clerks, each three thousand dollars; corporals, two thousand dollars; and privates one thousand dollars; with good and solvent security, as the law directs, for the faithful performance of their duties.

The various officers shall receive a salary of not less than the following rates:

The chief of police.....	\$250 per month.
The lieutenants of police.....	150 " "
The sergeants of police.....	100 " "
The clerks of police.....	100 " "
The corporals of police..	90 " "
The privates (day and night) each.....	80 " "

TITLE IX.

LABOR ON PUBLIC WORKS.

Art. 134. The Legislature may establish the price and pay of foremen, mechanics, laborers and others employed on the public works of the State or parochial or city governments: *Provided*, that the compensation to be paid all foremen, mechanics, cartmen and laborers employed on the public works, under the government of the State of Louisiana, city of New Orleans, and the police juries of the various parishes of the State,

shall not be less than as follows, viz: Foremen, \$3 50 per day; mechanics, \$3 00 per day; cartmen, \$3 50 per day; laborers, \$2 00 per day.

Art. 135. Nine hours shall constitute a day's labor for all mechanics, artisans and laborers employed on public works.

TITLE X.

INTERNAL IMPROVEMENTS.

Art. 136. There shall be appointed by the governor a state engineer, skilled in the theory and practice of his profession, who shall hold his office at the seat of government for the term of four years. He shall have the superintendence and direction of all public works in which the State may be interested, except those made by joint stock companies or such as may be under the parochial or city authorities exclusively and not in conflict with the general laws of the State. He shall communicate to the General Assembly, through the governor, annually, his views concerning the same, report upon the condition of the public works in progress, recommend such measures as in his opinion the public interest of the State may require, and shall perform such other duties as may be prescribed by law. His salary shall be five thousand dollars per annum, until otherwise provided by law. The mode of appointment, number and salary of his assistants shall be fixed by law. The state engineer and assistants shall give bonds for the performance of their duties as shall be prescribed by law.

Art. 137. The General Assembly may create internal improvement districts, composed of one or more parishes, and may grant a right to the citizens thereof to tax themselves for their improvements. Said internal improvement districts, when created, shall have the right to select commissioners, shall have power to appoint officers, fix their pay and regulate all matters relative to the improvements of their districts, provided such improvements will not conflict with the general laws of the State.

Art. 138. The General Assembly may grant aid to said districts out of the funds arising from the swamp and overflowed lands, granted to the State by the United States for that purpose or otherwise.

Art. 139. The General Assembly shall have the right of abolishing the office of state engineer, by a majority vote of all the members elected to each branch, and of substituting a board of public works in lieu thereof, should they deem it necessary.

TITLE XI.

PUBLIC EDUCATION.

Art. 140. There shall be elected a superintendent of public education, who shall hold his office for the term of four years. His duties shall be prescribed by law, and he shall receive a salary of four thousand dollars

per annum until otherwise provided by law: *Provided*, that the General Assembly shall have power by a vote of a majority of the members elected to both Houses, to abolish the said office of superintendent of public education, whenever, in their opinion, said office shall be no longer necessary.

Art. 141. The Legislature shall provide for the education of all children of the State, between the ages of six and eighteen years, by maintenance of free public schools by taxation or otherwise.

Art. 142. The general exercises in the common schools shall be conducted in the English language.

Art. 143. A university shall be established in the city of New Orleans. It shall be composed of four faculties, to-wit: one of law, one of medicine, one of the natural sciences, and one of letters; the Legislature shall provide by law for its organization and maintenance.

Art. 144. The proceeds of all lands heretofore granted by the United States to this State for the use or purpose of the public schools, and of all lands which may hereafter be granted or bequeathed for that purpose, and the proceeds of the estates of deceased persons to which the State may become entitled by law, shall be and remain a perpetual fund on which the State shall pay an annual interest of six per cent., which interest, together with the interest of the trust funds, deposited with the State by the United States, under the act of Congress, approved June 23, 1836, and all the rents of the unsold lands shall be appropriated to the purpose of such schools, and the appropriation shall remain inviolable.

Art. 145. All moneys arising from the sales which have been or may hereafter be made of any lands heretofore granted by the United States to this State for the use of a specific seminary of learning, or from any kind of a donation that may hereafter be made for that purpose, shall be and remain a perpetual fund, the interest of which, at six per cent. per annum, shall be appropriated to the promotion of literature and the arts and sciences, and no law shall ever be made diverting said funds to any other use than to the establishment and improvement of said seminary of learning; and the General Assembly shall have power to raise funds for the organization and support of said seminary of learning in such manner as it may deem proper.

Art. 146. No appropriation shall be made by the Legislature for the support of any private school or institution of learning whatever, but the highest encouragement shall be granted to public schools throughout the State.

TITLE XII.

MODE OF REVISING THE CONSTITUTION.

Art. 147. Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall

be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon. Such proposed amendment or amendments shall be submitted to the people at an election to be ordered by said Legislature, and held within ninety days after the adjournment of the same, and after thirty days' publication according to law; and if a majority of the voters at said election shall approve and ratify such amendment or amendments, the same shall become a part of the Constitution. If more than one amendment be submitted at a time, they shall be submitted in such manner and form that the people may vote for or against each amendment separately.

TITLE XIII.

SCHEDULE.

Art. 148. The Constitution adopted in 1852 is declared to be superseded by this Constitution; and in order to carry the same into effect, it is hereby declared and ordained as follows:

Art. 149. All rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, shall continue as if the same had not been adopted.

Art. 150. In order that no inconvenience may result to the public service from the taking effect of this Constitution, no officer shall be superseded thereby; but the laws of this State relative to the duties of the several officers, executive, judicial and military, except those made void by military authority, and by the ordinance of emancipation, shall remain in full force, though the same be contrary to this Constitution, and the several duties shall be performed by the respective officers of the State, according to the existing laws, until the organization of the government under this Constitution, and the entering into office of the new officers to be appointed under said government, and no longer.

Art. 151. The Legislature shall provide for the removal of all causes now pending in the Supreme Court or other courts of the State under the Constitution of 1852, to courts created by or under this Constitution.

TITLE XIV.

ORDINANCE.

Art. 152. Immediately after the adjournment of the Convention, the governor shall issue his proclamation directing the several officers of this

State, authorized by law to hold elections, or in default thereof such officers as he shall designate, to open and hold polls in the several parishes of the State, at the places designated by law, on the first Monday of September, 1864, for the purpose of taking the sense of the good people of this State in regard to the adoption or rejection of this Constitution; and it shall be the duty of said officers to receive the suffrages of all qualified voters. Each voter shall express his opinion by depositing in the ballot-box a ticket whereon shall be written "The Constitution accepted," or, "The Constitution rejected." At the conclusion of the said election, the officers and commissioners appointed to preside over the same shall carefully examine and count each ballot as deposited, and shall forthwith make due return thereof to the secretary of state, in conformity to the provisions of law and usages in regard to elections.

Art. 153. Upon the receipt of said returns, or on the third Monday of September, if the returns be not sooner received, it shall be the duty of the governor, the secretary of state, the attorney general and the state treasurer, in the presence of all such persons as may choose to attend, to compare the votes at the said election for the ratification or rejection of this Constitution, and if it shall appear at the close, that a majority of all the votes given is for ratifying this Constitution, then it shall be the duty of the governor to make proclamation of the fact, and thenceforth this Constitution shall be ordained and established as the Constitution of the State of Louisiana. But whether this Constitution be accepted or rejected, it shall be the duty of the governor to cause to be published the result of the polls, showing the number of votes cast in each parish for and against this Constitution.

Art. 154. As soon as a general election can be held under this Constitution in every parish of the State, the governor shall, by proclamation, or in case of his failure to act, the Legislature shall, by resolution, declare the fact, and order an election to be held on a day fixed in said proclamation or resolution, and within sixty days from the date thereof, for governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general and superintendent of education. The officers so chosen shall, on the fourth Monday after their election, be installed into office; and shall hold their offices for the terms prescribed in this Constitution, counting from the second Monday in January next preceding their entering into office in case they do not enter into office on that date. The terms of office of the State officers elected on the 22d day of February, 1864, shall expire on the installation of their successors as herein provided for; but under no state of circumstances shall their term of office be construed as extending beyond the length of the terms fixed for said offices in this Constitution; and, if not sooner held, the election of their successors shall take place on the first Monday of November, 1867, in all parishes where the same can be held, the officers elected on that date to enter into office on the second Monday in January, 1868.

Art. 155. This Constitution shall be published in three papers to be selected by the president of the Convention, whereof two shall publish

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the same in English and French, and one in German, from the period of the adjournment of the Convention until the election for ratification or rejection on the first Monday of September, 1864.

(Signed) E. H. DURELL,

President of the Constitutional Convention of the State of Louisiana.

O. W. AUSTIN,
JOHN T. BARRETT,
JOSEPH G. BAUM,
RAPHAEL BEAUVAIS,
ROBERT BRADSHAW BELL,
YOUNG BURKE,
EMILE COLLIN,
A. CAZABAT,
TERRENCE COOK,
F. M. CROZAT,
R. KING CUTLER,
JOHN L. DAVIES,
JAMES DUANE,
JOSEPH DUPATY,
H. C. EDWARDS,
JAMES ENNIS,
W. R. FISH,
G. H. FLAGG,
PATRICK HARNAN,
EDMOND FLOOD,
JOHN FOLEY,
G. A. FOSDICK,
JAMES FULLER,
GEORGE GEIER,
JOS. GORLINSKI,
JEREMIAH J. HEALY,
JOS. H. BALCH,
EDWARD HART,
THOMAS ONG,
JOHN HENDERSON, Jr.,
ROBERT W. BENNIE,
ALFRED C. HILLS,
JOHN SULLIVAN,
WILLIAM H. HIRE,
GEORGE HOWES,
M. D. KAVANAGH,
P. A. KUGLER,
WILLIAM DAVIS MANN,
XAVIER MAURER.

JOHN P. MONTAMAT,
ROBERT MORRIS,
EDWARD MURPHY,
M. W. MURPHY,
LUCIEN P. NORMAND,
P. K. O'CONNER,
JOHN PAYNE,
EUDALDO G. PINTADO,
O. H. POYNOT,
JOHN PURCELL,
SAMUEL PURSELL,
J. B. SCHROEDER,
MARTIN SCHNUBB,
WILLIAM H. SEYMOUR,
ALFRED SHAW,
CHARLES SMITH,
JOHN SPELLICY,
WILLIAM TOMPKINS STOCKER,
J. H. STINER,
C. W. STAUFFER,
J. RANDALL TERRY,
T. B. THORPE,
JOHN BUCKLEY, Jr.,
JOHN W. THOMAS,
ERNEST J. WENCK,
W. H. WATERS,
THOMAS M. WELLS,
JOSEPH HAMILTON WILSON,
JOHN A. NEWELL,
ROBERT W. TALIAFERRO,
M. F. BONZANO,
H. MILLSAUGH,
LOUIS GASTINEL,
JOSEPH V. BOFILL,
BENJAMIN H. ORR,
GEO. F. BROTT,
JOHN K. COOK,
H. MAAS.

JNO. E. NEELIS, Secretary.

No. 82.]

AN ACT

To organize the Supreme Court, and to fix the terms thereof.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That the State shall be divided into four districts; from each of which districts one associate justice of the Supreme Court shall be appointed by the governor, by and with the advice and consent of the Senate; the said districts to be as follows:*

First District—The parishes of Plaquemines, St. Bernard, that portion of the parish of Orleans on the right bank of the Mississippi river, and that portion of the city of New Orleans which lies below the line extending from the river Mississippi along the middle of Julia street, until it strikes the New Orleans canal, and thence down said canal to the lake.

Second District—That portion of the city of New Orleans which is situated above the line extending along the middle of Julia street until it strikes the New Orleans canal, and thence down said canal to the lake; and the parishes of Jefferson, St. John the Baptist, St. Charles, St. James, Ascension, Assumption, Lafourche Interior, Terrebonne, West Baton Rouge and Iberville.

Third District—The parishes of St. Tammany, Washington, Livingston, St. Helena, East Baton Rouge, East Feliciana, West Feliciana, Pointe Coupée, Avoyelles, Tensas, Concordia, Lafayette, Vermillion, St. Mary, St. Martin and St. Landry.

Fourth District—The parishes of Calcasieu, Rapides, Sabine, Natchitoches, DeSoto, Caddo, Bossier, Claiborne, Bienville, Caldwell, Union, Ouachita, Morehouse, Jackson, Franklin, Catahoula, Madison, Carroll and Winn.

SEC. 2. *Be it further enacted, &c., That the chief justice shall be appointed from the State at large by the governor, with the advice and consent of the Senate.*

SEC. 3. *Be it further enacted, &c., That the Supreme Court shall hold its sessions in New Orleans from the first Monday of November until the close of the month of June; at Monroe, commencing on the second Monday of July; at Natchitoches, on the second Monday of August; and at Opelousas, on the first Monday of September of each year.*

SEC. 4. *Be it further enacted, &c., That appeals from the parishes of Orleans, Jefferson, St. Charles, St. James, St. John the Baptist, Ascension, Assumption, Lafourche, Terrebonne, Plaquemines, St. Bernard,*

Iberville, St. Helena, Washington, St. Tammany, Livingston, East and West Baton Rouge, East and West Feliciana, Pointe Coupée, Concordia, Tensas, Madison and Carroll, shall be returned to the Supreme Court at New Orleans.

SEC. 5. *Be it further enacted, &c.,* That appeals from the parishes of St. Mary, St. Martin, St. Landry, Lafayette, Vermillion, Calcasieu and Avoyelles shall be returned to the Supreme Court at Opelousas.

SEC. 6. *Be it further enacted, &c.,* That appeals from the parishes of Jackson, Union, Morehouse, Catahoula, Caldwell, Ouachita, Franklin, Claiborne and Bienville shall be returned to the Supreme Court at Monroe.

SEC. 7. *Be it further enacted, &c.,* That appeals from the parishes of Rapides, Natchitoches, DeSoto, Sabine, Bossier, Caddo and Winn shall be returned to the Supreme Court at Natchitoches.

SEC. 8. *Be it further enacted, &c.,* That appeals from the parishes of East Feliciana, West Feliciana, East Baton Rouge, Livingston, St. Tammany, St. Helena and Washington shall be returnable on the fourth Monday of February in each year.

SEC. 9. *Be it further enacted, &c.,* That appeals from the parishes of Carroll, Madison, Tensas and Concordia shall be returnable on the second Monday of February of each year.

SEC. 10. *Be it further enacted, &c.,* That appeals from the parishes of St. James, Ascension, Assumption, Lafourche, Terrebonne, Iberville, West Baton Rouge and Pointe Coupée shall be returnable on the fourth Monday of January in each year.

SEC. 11. *Be it further enacted, &c.,* That in all cases of appeal the judge of the court from which it is taken shall make the appeal returnable from the Supreme Court at the next return day for appeals from the parish, if there shall be time enough after granting it to give the notice required by law and to prepare the record; if not, then he shall fix the return day for the following term.

SEC. 12. *Be it further enacted, &c.,* That upon the return day for appeals from the several parishes, as fixed by law, the Supreme Court shall take them up by preference and in their order, and continue from day to day until they are disposed of.

SEC. 13. *Be it further enacted, &c.,* That in all cases in which the right to office is involved, and an appeal is taken from the judgment of the district court, returnable before the Supreme Court holding its sessions in New Orleans, it shall be returnable in ten days after judgment of the lower court; and the Supreme Court, on the motion of either party, shall proceed to try the same by preference.

SEC. 14. *Be it further enacted, &c.,* That persons in confinement, under a judgment of conviction rendered in a criminal prosecution from which an appeal has been taken, shall have the right to make it returnable before the Supreme Court at its next term, whenever held, and to have it tried by preference. All criminal cases shall be tried by preference over civil cases.

SEC. 15. *Be it further enacted, &c.,* That in suits pending on appeal, in which a police jury or municipal corporation is plaintiff or defendant, it shall be the duty of the Supreme Court, if in session in the district in which the appeal is pending, on the affidavit of the attorney representing the police jury or corporation that the case is one of serious public interest, and in which a speedy decision is desirable, to set the cause for hearing by preference.

SEC. 16. *Be it further enacted, &c.,* That no appeal to the Supreme Court shall be dismissed on account of any defect, error, or irregularity of the petition or order of appeal, or in the certificate of the clerk or judge, or in the citation of appeal or service thereof, or because the appeal was not made returnable at the next term of the Supreme Court, whenever it shall not appear that such defect, error or irregularity is imputed to the appellant; but in all cases the court shall grant a reasonable time to correct such errors or irregularities (in case they are not waived by the appellee), and may impose on the appellant such terms and conditions as in their discretion they may deem necessary for the attainment of justice, and may also impose such fines on the officers who shall have caused such irregularities as they may deem proportioned to the offense.

SEC. 17. *Be it further enacted, &c.,* That in all cases of appeal to the Supreme Court, or other tribunals in this State, if the judgment appealed from be affirmed, the plaintiff may, on return of the execution that no property has been found, obtain a decree against the surety on the appeal bond for the amount of the judgment, on motion, after ten days' notice, which motion shall be tried summarily and without the intervention of a jury, unless the surety shall allege, under oath, that the signature to the bond purporting to be his is not genuine, or that the judgment has been satisfied.

SEC. 18. *Be it further enacted, &c.,* That the Supreme Court may be adjourned from day to day by one of its judges until a quorum be convened.

SEC. 19. *Be it further enacted, &c.,* That all laws contrary to the above, or on the same subject matter, be and are hereby repealed.

SEC. 20. *Be it further enacted, &c.,* That this Act shall be in force from and after its passage.

(Signed)

J. B. ELAM,

Speaker *pro tem.* of the House of Representatives.

(Signed)

ALBERT VOORHIES,

Lieutenant-Governor and President of the Senate.

Approved March 13, 1866.

(Signed)

J. MADISON WELLS,

Governor of the State of Louisiana.

A true copy :

J. H. HARDY,

Secretary of State.

No. 39.]

AN ACT

Relative to suits for the ejectment of tenants.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That all suits for the expulsion of tenants, brought in pursuance to the provisions of the Act entitled "an Act relative to landlords and tenants," approved March 15, 1855, shall at all times be tried by preference in the Supreme Court of this State, any law or laws to the contrary notwithstanding.

SEC. 2. *Be it further enacted, &c.,* That this Act shall take effect from and after its passage.

(Signed)

DUNCAN S. CAGE,

Speaker of the House of Representatives.

(Signed)

ALBERT VOORHIES,

Lieutenant-Governor and President of the Senate.

Approved February 26, 1866.

(Signed)

J. MADISON WELLS,

Governor of the State of Louisiana.

A true copy :

J. H. HARDY,

Secretary of State.

No. 44.]

AN ACT

Relative to District Courts for the Parish and City of New Orleans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That there shall be six District Courts in the parish and city of New Orleans, which shall be designated as follows: First, Second, Third, Fourth, Fifth and Sixth District Courts of New Orleans.

SEC. 2. *Be it further enacted, &c.,* That the courts shall be opened from the first Monday of November to the last Monday of July. But for criminal and probate causes, and for the granting and trial of interlocutory orders and writs of arrest, *habeas corpus*, injunctions, sequestrations, and provisional seizures, "on a motion to quash and not upon their merits," they shall remain open the whole year.

SEC. 3. *Be it further enacted, &c.,* That whenever the judge of any of the courts shall be interested in any cause brought in the court over

which he presides, or shall be related within the fourth degree to either of the parties, or shall recuse himself for any of the causes provided by law, or shall otherwise be incapable of, or disqualified from, trying the same, it shall be the duty of the judge of one of the other District Courts to preside in his place, and to proceed in such case as if it had been brought before him, and to discharge each and all the duties which the judge of that court would have to discharge if present.

SEC. 4. *Be it further enacted, &c.*, That the judges of the courts shall have the right, and are hereby directed to establish such uniform rules as may be necessary to expedite business, and to issue all orders which may be proper and requisite for the exercise of their respective jurisdiction, but the rules must be established by a majority of the judges.

SEC. 5. *Be it further enacted, &c.*, That the First District Court of New Orleans shall have exclusive cognizance of, and shall hear and determine, according to law, all prosecutions for all crimes, misdemeanors and offences whatever, which have been or which shall be committed within the limits of the First Judicial District, except such minor offences as shall by law be referred to the jurisdiction of the recorders of the city, or other police tribunals that may hereafter be organized by law. It shall have no other jurisdiction.

SEC. 6. *Be it further enacted, &c.*, That the grand jurors of the parish of Orleans shall be impaneled before, and shall return to the First District Court all bills by them found, and all presentments by them made.

SEC. 7. *Be it further enacted, &c.*, That all examinations, declarations, depositions, confessions, affidavits, bonds, recognizance, and generally all other instruments, acts, documents, and papers, whatever, taken or received in or concerning any criminal cause, shall be transmitted without delay by the justice of the peace, recorder or other committing magistrate of the parish of Orleans, taking or receiving the same, to the clerk of the First District Court, and he shall forthwith transmit them to the attorney general or district attorney appointed for the parish of Orleans, or First Judicial District.

SEC. 8. *Be it further enacted, &c.*, That the Second District Court shall be strictly a probate court, and shall have exclusive jurisdiction only of all successions and probate causes, and all appointments that may be necessary in the course of administration of estates, all matters relative to minors, to persons interdicted and to absentees, or in which they are interested, shall be made and carried on in said court.

SEC. 9. *Be it further enacted, &c.*, That the Third District Court shall have exclusive jurisdiction over the justices of the peace in civil matters only, and all appeals rendered by the justices of the peace in the parish of Orleans shall be made returnable to this court.

SEC. 10. *Be it further enacted, &c.*, That the Third District Court shall have the exclusive power to issue writs of certiorari, prohibition, mandamus, or such other order, to the justices of the peace, as may be necessary to carry out its appellate jurisdiction, or to prevent them from extending their jurisdiction, or denying justice to any one. And in all cases, when a party shall have cause to complain of any judgment by

a justice of the peace, or act of any constable of a justice of the peace, or his deputies, and shall think proper to apply to a higher court for relief—by writs of injunctions, mandamus, sequestrations, action of nullity, or otherwise—it shall be to this court only, and to no other, that he shall apply for relief; *Provided*, that appeals shall have the precedence over all other cases.

SEC. 11. *Be it further enacted, &c.*, That the Third, Fourth, Fifth and Sixth District Courts of New Orleans shall have concurrent jurisdiction in all civil cases whatever, including writs of *habeas corpus*, power of naturalization, in which the First and Second District Courts of New Orleans shall also have concurrent jurisdiction.

SEC. 12. *Be it further enacted, &c.*, That the District Courts of New Orleans shall be without jurisdiction in all civil cases when the amount in dispute does not exceed one hundred dollars, exclusive of interest and costs, except the Third District Court, in its appellate jurisdiction.

SEC. 13. *Be it further enacted, &c.*, That the courts for the city and parish of Orleans shall hold their sessions in one and the same building, except the First District Court. The place for holding them shall be fixed by the common council of the city of New Orleans.

SEC. 14. *Be it further enacted, &c.*, That it shall be the duty of each of the judges of the District Courts of New Orleans, commencing with the judge of the First District Court, to hold alternately during the week the court which any one of the judges may be incapacitated from holding, by reason of illness or by leave of absence.

SEC. 15. *Be it further enacted, &c.*, That there shall be an interval of one week in the court, commencing on the first judicial day of the week after the judges of the several courts have each served in rotation. If the trial of any cause shall be protracted beyond the judicial week in any of the courts, the judge shall continue until it is completed.

SEC. 16. *Be it further enacted, &c.*, That for the time being the Fourth and Fifth District Courts of New Orleans shall be presided over by the judges of the other courts "without any additional compensation therefor," beginning with the judge of the First District Court, for the sole and only purpose of disposing of the cases on file in said courts, until the governor thinks proper to open them by appointing the judges thereof.

SEC. 17. *Be it further enacted, &c.*, That this act shall take effect from and after its passage, but shall not apply to the cases now pending or filed before the several District Courts, and that all laws on the same subject matter, or contrary to the provisions of this Act, are repealed.

SIMEON BELDEN,

Speaker of the House of Representatives.

LOUIS GASTINEL,

Ex-officio Lieutenant-Governor and President of the Senate.

Approved March 29, 1865.

J. MADISON WELLS,

Governor of the State of Louisiana

A true copy:

S. WROTNOWSKI,

Secretary of State.

No. 86.]

AN ACT

To amend an Act entitled "an Act relative to District Courts for the Parish and City of New Orleans," approved March 29, 1865.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the second section of an Act entitled "an Act relative to district courts for the parish and city of New Orleans," approved on March 29, 1865, which reads as follows, to-wit: "That the courts shall be opened from the first Monday of November to the last Monday of July, but for criminal and probate causes, and for granting and trial of interlocutory orders and writs of arrest, *habeas corpus*, injunctions, sequestrations and provisional seizures, on a motion to quash, and not upon their merits, they shall remain open the whole year," be and is hereby amended and re-enacted so as to read as follows, to-wit: The courts shall be opened from the first Monday of November to the fourth day of July, and for criminal and probate causes, for granting interlocutory orders and writs of arrest, *habeas corpus*, injunctions, sequestrations, attachments, mandamus and provisional seizures, on a motion to quash, and not upon their merits, they shall remain open the whole year; also, for the purpose of trying proceedings instituted by a landlord for the possession of leased property.

SEC. 2. *Be it further enacted, &c.,* That this Act shall take effect from and after its passage.

(Signed)

J. B. ELAM,

Speaker *pro tem.* of the House of Representatives.

(Signed)

ALBERT VOORHIES,

Lieutenant-Governor and President of the Senate.

Approved March 13, 1866.

(Signed)

J. MADISON WELLS,

Governor of the State of Louisiana.

A true copy:

J. H. HARDY,

Secretary of State.

RULES

ADOPTED BY THE

SUPREME COURT OF THE STATE OF LOUISIANA,

DECEMBER 7, 1856.

I.

The Clerks of the several Courts of this State are directed, in all cases of appeals returnable to this Court, to have the records copied in a fair, legible hand, on good strong paper, with a margin on each side of the page, and to annex thereto an index referring to the pleadings and orders and to the depositions of each witness by name, and to the page of every document by its title or some sufficient description thereof.

II.

The party applying for the filing of the record of any cause in this Court, shall, at the same time, tender to the Clerk his bond and security in the sum of fifty dollars, for the payment of the fees which shall accrue to said Clerk in such suit.

III.

Within two days after any cause shall be fixed for argument, the appellant shall file with the Clerk a printed or fairly written brief or abstract of the cause, containing the substance of all the material pleadings, facts and documents on which he relies, and the points of law and fact intended to be presented at the argument, with a reference to all the authorities upon which he intends to rely—six copies thereof to be furnished and filed with the Clerk, one for each of the Judges and one for the opposite counsel. Within four days after the fixing of the cause the appellee shall file a like brief or abstract in like manner.

No cause shall be heard unless at least one of the parties has complied with the foregoing rule, and if one party has so complied and the other has not, the party who has complied may decline to argue the cause, and it shall thereupon go to the foot of the Docket.—*Amended April 2, 1855. See Amendment No. 6.*

IV.

All cases which have stood on the Docket for the space of eighteen months without being set down for trial, shall be removed therefrom, and placed on a separate docket, to be called the "Delay Docket," and they shall not be again put on the Trial Docket unless on motion, and leave granted thereon.

V.

In conformity with article 756 of the Code of Practice, the Clerk will keep a separate Docket of the causes which are to be tried summarily, which cases are those of applications and trials of:

Mandamus, writs of prohibition, certiorari, quo warranto, orders of arrest and discharge therefrom, dissolving or setting aside writs of attachment or sustaining them improperly, setting aside or annulling writs of sequestration or provisional seizure, whenever an appeal will lie from the interlocutory judgment rendered; dissolution of injunctions on the allegations in the petition; also in cases of injunctions or opposition in cases where no security is required to be given by law; the nomination or appointment of tutors or curators of minors or persons absent or interdicted, or vacant successions, or of attorneys for absent heirs and the syndics of creditors, when the Court orders they shall administer provisionally; motions to homologate the reports of experts, accounts of auditors, awards of arbitrators, nominations of syndics by creditors in cases of cession of goods, or successions where the creditors are authorized to appoint administrators or syndics; disputes relating to the privileges of creditors of a bankrupt and the order in which they are to be paid; also orders or judgments requiring syndics of creditors or curators or administrators of successions to exhibit their bank book or accounts; motions against attorneys at law, sheriffs, coroners, or other public officers, to recover from them money received in their official capacities, whenever the law allows a summary mode of proceeding; and all cases against attorneys at law to deprive them of their licenses; against Clerks of Courts accused of offences that are to be tried by this Court; cases arising under the 13th section of the act of March 20, 1839, entitled "An act to amend the Code of Practice," and the act extending the provisions of the same; cases arising under the act of March 28, 1840, entitled "An act to abolish imprisonment for debt;" judgments rendered on exceptions to the jurisdiction of a Court when the exception shall be or has been sustained; all cases in which the appellee or appellant is or shall be in actual custody.

The cases placed on this Docket will be set for Tuesday in each week, unless the Court shall otherwise order. Cases on the Promissory Note Docket will be set for Monday in each week; but whenever the cases on it are called through, and not a sufficient number are found for Monday, the cases on the Summary Docket will be called and set for that day and the one succeeding.—*Amended. See Amendments No. 7.*

Whenever the Clerk of this Court is in doubt as to the Docket on which he should place a cause, he shall submit it to one of the Judges for his opinion.—*Amended April 24, 1854. See Amendment No. 2.*

VI.

The original plaintiff in the inferior Court shall have the right of opening and closing the argument of the cause in this Court.

VII.

The Court will listen to no motion for a prohibition without previous reasonable notice of such motion to the opposite party or his counsel.

VIII.

The Court will hereafter in no case give further time for presenting a petition for rehearing, but will, upon a proper showing after such petition shall have been filed, allow time to amend, by making other points or citing further authorities.

IX.

Applications for rehearing must be in writing, and must state fully the points and authorities on which the party founds his application.

Arguments on rehearing granted must be in writing, unless by leave of the Court. The party against whom the rehearing is granted will be considered as having notice of the order for rehearing and of the applicant's argument, and must file his argument upon the points as to which the rehearing is granted within three judicial days from the date of the order. The party who obtained the rehearing shall have three judicial days thereafter to reply. If any party shall fail to file his argument within the time limited, the Court will take the cause for final consideration:

Provided, that in all cases the Court may, under special circumstances and on motion, enlarge the time for the filing of arguments on rehearing, if such enlargement be applied to before the expiration of the time herein specified.

X.

No person applying for admission as an attorney and counsellor at law, shall be examined as such until his name, as candidate for admission,



shall have been, by the Clerk, published during three judicial days, at the foot of the trial list posted in the court-room. Application to be made through the Clerk.

XI.

The Court will hereafter require of candidates for admission to the bar, whether previously licensed in another State or not :

1st. Evidence of citizenship of the United States ;

2d. Evidence of good moral character by certificates in conformity to the statutes of March 27, 1823, and March 20, 1842 ; and 3d, except when a license is produced from another State, evidence of one year's residence in this State.

The Court will not be satisfied with the qualification of a candidate in point of legal learning unless it shall appear by examination that he is well read in the following studies at least : Story on the Constitution ; the general laws of the United States ; Vattel's Laws of Nations ; the Louisiana Code ; the Code of Practice ; the Statutes of the State, of a general nature ; the Institutes of Justinian ; Domat's Civil Law ; Pothier's Treatise on Obligations ; Blackstone's Commentaries ; Kent's Commentaries ; Chitty or Bayley on Bills ; Starkie or Philips on Evidence ; Russell on Crimes ; and the Jurisprudence of Louisiana as settled by the decisions of the Supreme Court.

The examination shall be conducted in the following manner : Every six months in New Orleans the Court will appoint from among the members of the bar a committee of seven, who are earnestly requested to lend their aid to the Court. Upon the candidate producing a certificate from the committee that he has been strictly and rigidly examined by them upon the above works, and that he is in their opinion qualified for admission to the bar, the Court will admit him to a public examination, and if after such public examination they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counsellor at law, and not otherwise.

As to those who have been admitted to the bar in other States, it is the wish of the Court that they should present themselves first before the Board of Examiners.

The committee will meet twice in each month during the sessions of the Supreme Court, to-wit : on the first and third Fridays of each month, at 5 o'clock P. M.

Each candidate to be examined separately.

AMENDMENTS.

I.

In consequence of the great number of cases upon the docket, the following rule is adopted, to-wit :

It is ordered that not more than *one hour* will be allowed for an opening argument ; one hour to each counsel for the defence (not exceeding two) ; and one hour for the closing arguments ; except where in special cases the Court on previous application may otherwise order.—*Adopted December 6, 1853.*

II.

It is ordered that the 5th Rule be so amended as to entitle all causes to be placed on the Summary Docket, which by law are entitled to be and have been tried summarily in the Court below.—*Adopted April 24, 1854.*

III.

1st. Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases.

2d. When the appellant dies pending the appeal, if his proper representatives be known, and reside within the State, and have not made themselves parties to the case, the appellee may, on affidavit, apply for an order to summon them to appear within twenty-five days ; and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

3d. If the proper representatives of the appellant be not known or do not reside within the State, the appellee may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appeal will be dismissed, and cause the said order to be published three times in a newspaper printed at the seat of government of the State, or in the place where the Court sits ; and upon proof of such publication, and default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined as in other cases.

4th. If the appellee die, pending the appeal, and his proper representatives be known, and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days ; and in default of such appearance, after due return of service, the appellant may proceed to have the cause heard and determined as in other cases.

5th. If the appellee's proper representatives be not known or do not reside in the State, the appellant may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appellant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper printed at the seat of government of the State, or in the place where the Court sits; and upon proof of such publication and default of appearance, the appellant may proceed to have the cause heard and determined as in other cases.

6th. In country cases the time of personal summons may be reduced on special application according to circumstances.—*Adopted May 29, 1854.*

IV.

It is ordered that all motions to dismiss appeals shall be in writing, and all the grounds relied upon shall be distinctly set forth.

Such motion shall be filed with the Clerk of the Court, and fixed for trial upon Monday of each week, at the request of either party, at least one week's previous notice being given in the usual manner, by posting at the Court-room door. One hour upon the opening of the Court upon Monday of each week shall be allowed for the trial of such motions, and those not tried upon the day for which they are fixed, shall stand over for the next succeeding Monday.—*Adopted January 15, 1855.*

V.

Parties and counsel are at liberty, upon filing their written consent with the Clerk, to submit upon brief, causes, whether they have been regularly reached and assigned for trial or not. This rule will continue until the bar are notified to the contrary. These causes will be disposed of in their order, and without any material interference with the causes regularly assigned.—*Adopted January 17, 1855. Amended. See Amendments No. 7, 2d clause.*

VI.

It is ordered that the second clause of the third Rule be amended so as to read as follows:

No cause shall be heard unless at least one of the parties has complied with the foregoing Rule; and if both parties have failed to comply with said Rule, the cause shall be continued, and go to the foot of the Ordinary Docket. A party who has complied (the other party not having complied) may decline to argue the cause, in which case also the cause shall be continued, and go to the foot of the Ordinary Docket.—*Adopted April 2, 1855.*

VII.

1. It is ordered that the 3d paragraph of the 5th Rule of Court, adopted December 7, 1846, is repealed, and hereafter Monday of each week shall be reserved for the trial of the causes upon the Criminal, Summary and Promissory Note Docket, and such other causes as are entitled to preference by law or by Rule of Court exclusively, and Tuesday and Wednesday of each week shall be reserved for the trial of causes upon the Ordinary Docket, exclusively.

2. It is ordered that in all causes where motions to dismiss are fixed for trial separately from the writs, under the rules adopted January 15, 1855, such motions shall hereafter be argued only by written or printed briefs, and not orally; and it is ordered that the last clause of the Rule aforesaid, reserving one hour for the argument of such motion on Monday, be rescinded.—*Rules adopted November 23, 1857.*

VIII.

The Clerk is directed to receive no brief after the argument of a cause, unless accompanied by a certificate in writing by counsel, stating that he has delivered a copy to the opposite counsel, with the date of such delivery, or a written acknowledgment or waiver of such delivery signed by the opposite counsel.